

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Plaintiff in Error,

vs.

EVELYN E. MASON,

Defendant in Error.

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**Transcript of Record.**

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Upon Writ of Error to the United States District Court of the  
District of Montana.

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FILED  
AUG 26 1920  
F. D. MONCKTON,  
CLERK.



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Circuit Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys of Record.**

GEORGE A. JUDSON, Esq., and H. R. EICKE-  
MEYER, Esq., of Great Falls, Montana,

For Plaintiff and Defendant in Error.

Messrs. WALSH, NOLAN & SCALLON, of  
Helena, Montana, and FLETCHER MAD-  
DOX, Esq., of Great Falls, Montana,

For Defendant and Plaintiff in Error.

[1\*]

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In the District Court of the United States in and for  
the District of Montana.

No. 783.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Defendant.

BE IT REMEMBERED, that on September 26th,  
1919, Transcript on Removal of the said cause from  
the District Court of the Eighth Judicial District  
of the State of Montana in and for the County of  
Cascade, was duly filed herein, the plaintiff's com-  
plaint contained in said transcript on removal, being  
in the words and figures following, to wit: [2]

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\*Page-number appearing at foot of page of original certified Transcript  
of Record.

In the District Court of the Eighth Judicial District  
of the State of Montana, in and for the County  
of Cascade.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Defendant.

### Complaint.

Plaintiff complains of the defendant, and for  
cause of action respectfully shows to the Court and  
alleges:

1st.

That the defendant is now and at all times herein-  
after mentioned was a corporation, organized and  
existing under and by virtue of the laws of the State  
of New York and licensed and empowered to trans-  
act business in its special line in the State of Mon-  
tana.

2d.

That on or about the 14th day of  
1917, 12/22/19  
December, A. D. ~~1918~~, in consideration H. H. W.  
of the premium of Two Hundred  
Twenty-two and 50/100 Dollars (\$222.50), payable  
annually for twenty years from the date of the pol-  
icy hereinafter set forth, the defendant, by its  
agents, duly authorized thereto, executed its policy  
of insurance in writing to one George Mason, on his

life, in the sum of Five Thousand Dollars, a copy of which is hereto annexed marked Exhibit "A" and made a part of this complaint.

3d.

That on or about the 6th day of May, A. D. 1919, at Great Falls, Montana, the said George Mason died, but his death [3] did not result from self-destruction or as a result directly or indirectly of a state of warfare or insurrection outside the boundaries of continental United States or elsewhere; that the said insured did not, during the term of this policy, travel or reside outside the continental United States or the Dominion of Canada.

4th.

That this plaintiff, Evelyn E. Mason, was the wife of the said George Mason at the time said policy herein mentioned was issued to him, and so remained at the time of his death.

5th.

That on or before the 14th day of December, A. D. 1918, the said George Mason, now deceased, paid to this defendant, the New York Life Insurance Company, a corporation, the sum of Two Hundred Twenty-two and 50/100 Dollars (\$222.50), being the payment in advance, constituting the second premium under said policy, and which said premium would maintain said policy in full force and effect to December 14, 1919.

6th.

That said Evelyn E. Mason duly fulfilled all of the agreements and conditions of said policy of insurance on her part to be done and performed as bene-

fiary thereunder, and that this plaintiff, to wit, on or about the 12th day of May, A. D. 1919, made and delivered to the defendant, New York Life Insurance Company, due notice and proof of the death of said George Mason, in accordance with the requirements of said policy.

7th.

That at many times prior to the commencement of this [4] action, the plaintiff demanded of the defendant the payment of said sum of Five Thousand Dollars; that no part of the said sum of Five Thousand Dollars has been paid, and the whole thereof is now due thereon from the defendant to the plaintiff, as such beneficiary under said policy, together with interest thereon from the defendant to the plaintiff at the rate of eight per cent per annum from date such notice of proof was filed with the defendant, as aforesaid.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Five Thousand Dollars, as provided for in said policy, together with interest thereon at the rate of eight per cent per annum from the 12th day of May, A. D. 1919, together with her costs and disbursements herein.

GEORGE A. JUDSON,  
Attorney for Plaintiff. [5]

State of Montana,  
County of Cascade,—ss.

Evelyn E. Mason, being first duly sworn upon oath, deposes and says: That she is the plaintiff named in the foregoing action; that she has read the foregoing complaint and knows the contents thereof

and that the matters and things therein stated are true of her own knowledge.

EVELYN E. MASON.

Subscribed and sworn to before me this 5th day of Aug., 1919.

[Seal]

GEORGE A. JUDSON,

Notary Public for the State of Montana, Residing at Great Falls, Montana.

My commission expires April 1, 1920. [6]

**Exhibit "A."**

NEW YORK LIFE INSURANCE CO.

AGREES TO PAY

to Evelyn E., wife of the insured \* \* \* Beneficiary, (with the right on the part of the insured to change the Beneficiary in the manner provided in Section 6).

Beneficia

\* \* \* FIVE THOUSAND \* \* \* Dollars,  
(the face of this Policy)

Face Am

upon receipt of due proof of the death of \* \* \* GEORGE MASON \* \* \* the insured;  
DOUBLE THE FACE OF THIS POLICY.

Insured

or Double Indemnity

UPON RECEIPT of due proof that the death of the insured was caused directly by accident while traveling as a passenger on a street car, railway train, steamship licensed for regular transportation of passengers, or other public conveyance operated by a common carrier, and that such death occurred within sixty days after such accident; and

TO PAY TO THE INSURED

ONE-TENTH OF THE FACE OF THIS POLICY Per annum during the lifetime of the Insured, if the Insured becomes wholly and permanently disabled before age 60, subject to all the terms and conditions contained in Section 1 hereof.

THIS POLICY CONTAINS THE FOLLOWING BENEFITS AND PROVISIONS:

Permanent Disability.

General Benefits and Provisions.

Premium.

	Section
Total and Permanent Disability Benefits.....	1
Participation in Surplus—Dividends.....	2
Loan Values .....	3
Surrender Values .....	4
Term Insurance in case of Loan.....	5
Other Benefits and Provisions.....	6
Optional Methods of Settlement.....	7

This contract is made in consideration of the payment in advance of the sum of \$222.50, the receipt of which is hereby acknowledged, constituting the first premium and maintaining this policy to the 14th day of December, Nineteen Hundred and Eighteen, and of a like sum on said date and every Twelve Calendar months thereafter during the [7] life of the Insured, until premiums for Twenty full years in all shall have been paid from the date on which the policy takes effect.

This Policy takes effect as of the 14th day of December, Nineteen Hundred and Seventeen, which day is the anniversary of the Policy. If the Insured becomes wholly and permanently disabled before age 60, the payment of premiums will be waived under the terms and conditions contained in Section 1.

Insurance payable at death. Premiums payable for 20 years. Total and Permanent Disability Benefits. Double Indemnity for fatal travel accident. Annual Participation in Surplus.

I. P. 1  
D. & D.  
917-2.  
Age 40

## SECTION 1. TOTAL AND PERMANENT DISABILITY BENEFITS.

Whenever the Company receives due proof, before default in the payment of premium, that the Insured, before the anniversary of the Policy on which the Insured's age at nearest birthday is 60 years and subsequent to the delivery hereof, has become wholly disabled by bodily injury or disease so that he is and will be presumably, thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit, and that such disability has then existed for not less than sixty days—the permanent loss of the sight of both eyes, or the severance of both hands or of both feet, or of one entire hand and one entire foot, to be considered a total and permanent disability without prejudice to other causes of disability—then

1. **WAIVER OF PREMIUM.** — Commencing with the anniversary of the Policy next succeeding the receipt of such proof, the Company will on each anniversary waive payment of the premium for the ensuing insurance year, and, in any settlement of the policy, the Company will not deduct the premiums so waived. The loan and surrender values provided for under Sections 3 and 4 shall be calculated on the basis employed in said sections, the same as if the waived premiums had been paid as they became due.

2. LIFE INCOME TO INSURED.—One year after the anniversary of the Policy next succeeding the receipt of such proof, the Company will pay the Insured a sum equal to one-tenth of the face of the Policy and a like sum on each anniversary thereafter during the lifetime and continued disability of the Insured. Such income payments shall not reduce the sum payable in any settlement of the Policy. The Policy must be returned to the Company for indorsement thereon of each income payment. If there be any indebtedness on the Policy, the interest thereon may be deducted from each income payment.

3. RECOVERY FROM DISABILITY.—The Company at any time and from time to time, but not oftener than once a year, demand due proof of such continued disability, and upon failure to furnish such proof, or if it appears that the Insured is no longer wholly disabled as aforesaid, no further premiums shall be waived nor income payments made. [8] The annual premium for the Total and Permanent Disability Benefits is \$7.90, and is included in the premium stated on the first page of this Policy. Any premium due on or after the anniversary of the Policy on which the age of the Insured at nearest birthday is 60, shall be reduced by the amount of premium charged for the Disability Benefits.

## SECTION 2. PARTICIPATION IN SURPLUS —DIVIDENDS.

The proportion of divisible surplus accruing upon this Policy shall be ascertained annually. Beginning at the end of the second Insurance year, and

on each anniversary thereafter, such surpluses shall have been apportioned by the Company to this Policy shall at the option of the insured be either (a) Paid in cash; or (b) Applied toward payment of premiums; or (c) Applied to purchase a Participating Paid-up Addition to the sum insured; or (d) Left to accumulate at such rate of interest as the Company may declare on funds so held, but at a rate never less than three per cent compounded and credited annually, and withdrawable in cash on any anniversary, or payable at the maturity of the Policy to the person entitled to its proceeds.

If the Insured fails to notify the Company in writing, within three months after the Company shall have mailed to him a written notice of the amount of said dividend and the options available as aforesaid, which option he selects, the Company will apply said dividend to the purchase of a paid-up addition to the sum insured. Such paid-up addition may be surrendered for cash at any time not later than three months after any default in the payment of premium, and the cash value thereof shall never be less than the original cash dividend.

Dividends may be applied to Reduce the Number of Premiums, or make Policy Mature as an Endowment. Whenever the cash value of this Policy, including the cash value of any dividend additions under Option (c) plus any sums held under Option (d), equals or exceeds the net single premium calculated on the same basis as the premium on this Policy for a Policy giving the same rights, privileges, and benefits, at the then attained age of the Insured, the

Company, on any anniversary of the Policy thereafter, upon the Insured's written request, will endorse the Policy as a fully paid-up, participating Policy, and will pay in cash the excess, if any, of such cash value over said single premium, and thereafter no further payment of premiums will be required; or whenever said cash value shall equal or exceed the face amount of this Policy, the Company, upon due surrender of the Policy and all claims thereunder, will pay in cash the face amount of the Policy and any excess of said cash value, less any indebtedness to the Company. [9]

### SECTION 3. LOAN VALUES.

After three full years' premiums have been paid and before default in the payment of premium, the Company will advance to the Insured on the sole security of this Policy as duly evidenced in writing any sum desired,—provided the total indebtedness to the Company, including any advance then made, shall never exceed that sum which with six per cent interest to the end of the then current insurance year shall equal the Cash Surrender Value. Interest on the Loan shall be at the rate of six per cent per annum payable annually on the anniversary of the Policy. If interest is not paid when due, it shall be added to the principal. All or any part of the indebtedness may be repaid at any time before the Company has deducted it from the value of the Policy. Failure to repay such indebtedness or to pay interest shall not avoid the Policy, but whenever the amount of the total indebtedness equals the Cash Surrender Value, the Policy shall become void one month after the

Company shall have mailed notice to the last known address of the insured and of the assignee of record, if any.

TABLE OF MINIMUM LOAN VALUES FOR EACH \$1,000 THE FACE AMOUNT

Yrs.	Prem. Paid.	Loan Value.	Yrs.	Prem. Paid.	Loan Value.
	3	\$58		15	\$433
	4	84		16	469
	5	113		17	507
	6	140		18	546
	7	170		19	586
	8	201		20	628
	9	233		21st year	639
	10	266		22d "	650
	11	298		23rd "	660
	12	330		24th "	671
	13	363		25th "	682
	14	398			

#### SECTION 4. SURRENDER VALUES.

After three full years' premiums have been paid, the Insured may, at the end of any insurance year or within three months after any default in payment of premium but not later, surrender the Policy, and (1) Receive its Cash Surrender Value; or

(2) Receive the amount of non-participating paid-up insurance which the cash surrender value at date of default less any indebtedness hereon will purchase, payable at the same time and on the same conditions as this Policy, but without disability or double indemnity benefits. The Insured may at any time obtain a loan on such paid-up insurance, or surrender it for its cash surrender value; or

(3) If the Policy be not surrendered for cash or for paid-up insurance within three months after default in payment of premium, its cash surrender

value at date of default, less the amount of any indebtedness, shall automatically purchase Continued Insurance from the date of default for [10] the face of the Policy plus any dividend additions and less any indebtedness to the Company. The Continued Insurance shall be without future participation and without the right to loans, cash surrender values, disability or double indemnity benefits.

The Cash surrender value shall be the reserve on the face of the Policy at the end of the insurance year or, in event of default, at the date of default (omitting fractions of a dollar per thousand of insurance) and the reserve on any outstanding paid-up additions, plus any dividends standing to the credit of the Policy, and less a surrender charge for the third to the ninth years, inclusive, of not more than one and one-half per cent of the face of the Policy. Such reserve will be computed on the basis of the American Table of Mortality and interest at three per cent, and the amount of paid-up insurance under (2) and the term of the continued insurance under (3) will be computed on the same basis at the attained age of the Insured on the date of default.

The values in the table opposite are computed in accordance with the above provisions, assuming that premiums have been paid in full when due for the number of years stated, that there is no indebtedness to the Company, no outstanding paid-up additions, and no dividends standing to the credit of the Policy; the surrender charge, if any, has been deducted.

TABLE OF GUARANTEED SURRENDER VALUES.

After policy has been in force.	Cash surrender value for ea. \$1,000 of the face amount.	Paid-up life ins. for ea. \$1,000 of the face am't. \$128	Face am't. of the policy cont'd for	
			Yrs.	Days.
3	\$62		6	72
4	90	183	8	254
5	120	240	10	356
6	149	291	12	269
7	181	347	14	153
8	214	402	15	310
9	248	457	17	26
10	283	511	18	48
11	316	560	18	341
12	350	608	19	241
13	385	657	20	127
14	422	705	21	9
15	459	754	21	271
16	498	802	22	199
17	538	851	23	179
18	579	900	24	259
19	622	950	26	217
20	666	1000	—	—
[11]				
21	678			
22	689			
23	700			
24	712			
25	723			
Years.				

POLICY PAID-UP  
PARTICIPATING.

Ed. June '16 20—P. L. 1,000 40

Values for later years will be computed on the same basis and will be furnished on request.

### SECTION 5. TERM INSURANCE IN CASE OF LOAN.

Any loan under this Policy may be covered by term insurance as follows:

1. The Insured must furnish evidence of insurability satisfactory to the Company.

2. The premium shall be computed at the attained age of the Insured at the time the term insurance is made or renewed.

3. Term insurance shall not exceed beyond the next anniversary, but may under the same conditions be renewed from year to year. No term insurance shall be made or renewed after age sixty-five.

4. If the term insurance exceeds the indebtedness, the Company may cancel the excess and refund the unearned premium.

5. Term insurance takes effect upon delivery to the Insured of the Company's Policy therefor. The sum payable as term insurance shall be applied to the cancelation of the indebtedness.

PREMIUM FOR EACH \$100 OF TERM INSURANCE.

In- sured's attained age.	Premium for one yr.	In- sured's attained age.	Premium for one yr.	In- sured's attained age.	Premium for one yr.	In- sured's attained age.	Premium for one yr.
15	\$0.73	28	\$0.79	41	\$0.96	54	\$1.67
16	0.74	29	0.80	42	0.99	55	1.79
17	0.74	30	0.81	43	1.01	56	1.91
18	0.74	31	0.82	44	1.04	57	2.05
19	0.75	32	0.83	45	1.07	58	2.21
20	0.75	33	0.84	46	1.11	59	2.38
21	0.76	34	0.85	47	1.15	60	2.57
22	0.76	35	0.86	48	1.20	61	2.78
23	0.77	36	0.87	49	1.26	62	3.01
24	0.77	37	0.89	50	1.33	63	3.26
25	0.78	38	0.90	51	1.40	64	3.55
26	0.78	39	0.92	52	1.48		
27	0.79	40	0.94	53	1.57		

For periods of less than one year, the premium shall be at the rate of one-tenth of the one year's premium for each month and fraction of a mo. [12]

## SECTION 6. OTHER BENEFITS AND PROVISIONS.

Age.—If the age of the Insured has been misstated, the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

Assignment.—Any assignment of this Policy must be made in duplicate and one copy filed with the Company at its Home Office. The Company assumes no responsibility for the validity of any assignment.

Change of Beneficiary.—The Insured may at any time, and from time to time, change the beneficiary, provided this Policy is not then assigned. Every change of beneficiary must be made by written notice to the Company at its Home Office accompanied by the Policy for indorsement of the change thereon by the Company, and unless so indorsed the change shall not take effect. After such indorsement the change shall relate back to and take effect as of the date the Insured signed said written notice of change whether the Insured be living at the time of such indorsement or not. In the event of the death of any beneficiary before the Insured the interest of such beneficiary shall vest in the Insured.

Grace.—If any premium is not paid on or before the day it falls due the policy-holder is in default; but a grace of one month (not less than thirty days) subject to an interest charge of five per cent per annum will be allowed for the payment of every premium after the first, during which time the insurance continues in force. If death occurs within

the period of grace the unpaid premium for the then current insurance year will be deducted from the amount payable hereunder.

Indebtedness.—Any indebtedness to the Company against the Policy shall be deducted in any settlement thereof.

Miscellaneous Provisions.—The Policy and the application therefor, copy of which is attached hereto, constitute the entire contract. All statements made by the Insured shall, in absence of fraud, be deemed representations and not warranties, and no such statement shall avoid the Policy or be used in defense to a claim under it, unless it be contained in the written application and a copy of the application and a copy is indorsed upon or attached to this Policy when used. The Insured may, without the consent of the beneficiary, receive every benefit, exercise every right and enjoy every privilege conferred upon the Insured by this Policy. No agent is authorized to waive forfeitures, or to make, modify or discharge contracts, or to extend the time for paying a premium. [13]

Optional Methods of Settlement.—If there is no assignment of this Policy, the Insured, or in case the Insured shall not have done so, the beneficiary after the Insured's death, may, by written notice to the Company at its Home Office, make the proceeds of this Policy payable under one of the options contained in Section 7, which section is indorsed hereon and made a part of this Policy.

Payment of Premiums.—All premiums are payable on or before their due date at the Home Office of

the Company or to an authorized agent of the Company, but only in exchange for the Company's official premium receipt signed by the President, a Vice-President, a Second Vice-President, a Secretary or the Treasurer of the Company, and countersigned by the person receiving the premium. No person has any authority to collect a premium unless he then holds said official premium receipt. The premium is always considered as payable annually in advance, but by agreement in writing and not otherwise may be made payable in semi-annual or quarterly payments. Any unpaid premiums required to complete payment for the current insurance year in which death occurs shall be deducted from the amount payable hereunder. The payment of the premium shall not maintain the Policy in force beyond the date when the next payment becomes due, except as to the benefits provided for herein after default in premium payment.

**Privilege of Change to Other Plans of Insurance.** At any time before default in payment of premium, provided the Insured is then less than 55 years of age and that payment of premium has not been waived under Section 1 hereof, the Insured may, without medical re-examination, exchange this Policy for a Policy of the same amount, disability and double indemnity benefits, upon any plan of insurance having a higher rate of premium issued by the Company at the time this Policy takes effect, and containing the same privileges, benefits and conditions as would have been included in the Policy if it had been issued originally on the new plan. Such exchange shall be

effective upon surrender of this Policy and the payment of a sum equal to the difference between the premiums on the new Policy and the premiums on this Policy up to the date of exchange, with compound interest at the rate of six per cent per annum from the due date of each premium to the date when the exchange is made, provided that if the premium for disability benefits on the new policy is less than the premium for disability benefits on this Policy, the difference in premiums shall be on the basis of the premiums for the two Policies exclusive of the premiums for disability benefits; allowance will be made for any larger cash dividends on the new plan. The new Policy shall take effect as of the date of this Policy, and the Premium shall be based upon the same age as this Policy at the rate in force at the date of this Policy. [14]

Reinstatement.—At any time within five years after any default, upon written application by the Insured and presentation at the Home Office of evidence of insurability satisfactory to the Company, this Policy may be reinstated together with any indebtedness in accordance with the Loan provisions of the Policy, upon payment of loan interest, and of arrears of premiums with five per cent interest thereon from their due date.

Self-destruction.—In event of self-destruction during the first two insurance years, whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal to the premiums thereon which have been paid to and received by the Com-

pany and no more. Except as provided by endorsement hereon.

THIS POLICY IS FREE OF CONDITIONS as to residence, travel, occupation, or military or naval service, and shall be incontestable after two years from its date of issue except for non-payment of premium. All benefits under this Policy are payable at the Home Office of the Company in the City and State of New York.

IN WITNESS WHEREOF the New York Life Insurance Company has caused this contract to be signed this Twenty-seventh day of December \* \* Nineteen Hundred and Seventeen.

DARWILL P. KINGSLEY,  
President.

SEYMOUR M. BALLARD,  
Secretary.

\_\_\_\_\_,  
Registrar.

Examined \_\_\_\_\_.

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If the insured shall die within two years from the date of issue of this Policy as a result directly or indirectly of a state of warfare or insurrection outside the boundaries of Continental United States, this Policy shall be null and void and the Company shall not be liable for any payment thereunder except for the return of the amount paid as premium.

If the Insured shall within two years from date of issue of this Policy travel or reside outside the boundaries of Continental United States or the Dominion of Canada, the provisions of this Policy

for Total and permanent disability and for double Indemnity benefits shall be null and void from the date when the Insured leaves the boundaries of Continental United States or the Dominion of Canada, and the Company will on demand refund the pro-rata premium paid for said benefits for the remainder of the current insurance year. The boundaries of Continental United States include the waters within three miles of the Coast line but do not include the Panama Canal Zone.

NEW YORK LIFE INSURANCE CO.

By SEYMOUR M. BALLARD,

Secretary.

New York, Dec. 27th, 1917. (793-17 o D. & D. I.)

[15]

#### SECTION 7—OPTIONAL METHODS OF SETTLEMENT.

OPTION 1.—The proceeds may be left with the Company subject to withdrawal in whole or in part at any time on demand in sums of not less than one hundred dollars. The Company will credit interest on the proceeds so left with it at such rate as it may each year declare on such funds, at a rate, however, never less than three per cent per annum and credited annually.

OPTION 2.—In equal installments for any agreed number of years.

OPTION 3.—In equal installments for twenty years, and for as many years thereafter as the beneficiary shall survive. The amount of each installment shall be determined by the attained age, on the date of the approval of proofs of death of the In-

sured, of the beneficiary to whom it is payable. If the Insured shall so direct in writing, the installments payable under this option shall not be transferable, nor subject to commutation or incumbrance during the lifetime of the beneficiary.

Any installments under options 2 or 3 shall be payable immediately upon approval of proofs of death of the Insured and annually, semi-annually, quarterly or monthly thereafter as may be agreed.

In the event of the death of a beneficiary any unpaid sum left with the Company under Option 1 shall be paid in one sum; any unpaid installments payable under Option 2, or any installments for the fixed period of twenty years only under Option 3 which shall not have been paid, shall be commuted at three per cent compound interest, and otherwise agreed in writing shall be paid in one sum to the executors or administrators of such beneficiary.

The sums payable under the foregoing options are based upon an assumed interest earning of three per cent, but if in any year the Company shall declare for that year upon funds held by it under such Options interest at a rate greater than three per cent, the sum payable under Option 2, or under Option 3 within the fixed period of twenty years, shall be increased accordingly.

After approval of proofs of the death of the Insured and upon surrender of the Policy, the Company will make and deliver to each Beneficiary a certificate evidencing his or her rights and benefits under the option selected.

Installments options are not applicable to a Pol-

icy which is payable to a corporation or co-partnership, not to policies under which the net sum payable is less than one thousand dollars.

The minimum payments will be \$50, when paid annually, \$25, when paid semi-annually, \$15, when paid quarterly, or \$10, when paid monthly, and the total of the fractional payments each year shall equal the annual payment each year as shown in the following tables, which are based upon a Policy, the proceeds of which are \$1,000. The figures contained in the table will apply pro rata to this Policy.

## OPTION 2.

Number of annual Installments....	2	3	4	5	6	7	8	9	10
Amount of ea. annual \$	\$	\$	\$	\$	\$	\$	\$	\$	\$
Installment..	507.39	343.23	261.19	211.99	179.22	155.83	138.30	124.69	113.81

OPTION 2 (Cont'd).

11	12	13	14	15	16	17	18	19	20	21	22	23	24	25
\$	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$	\$
104.92	97.53	91.29	85.94	81.32	77.29	73.74	70.59	67.78	65.25	62.98	60.91	59.04	57.32	55.75

OPTION 3.

Age of beneficiary at death of insured .....	0	1	2	3	4	5	6	7	8	9
Amount of each annual instalment .....	\$ 42.48	\$ 40.17	\$ 39.38	\$ 39.06	\$ 38.93	\$ 38.91	\$ 38.96	\$ 39.05	\$ 39.19	\$ 39.35
Age of beneficiary at death of insured .....	10	11	12	13	14	15	16	17	18	19
Amount of each annual instalment .....	39.52	39.70	39.88	40.08	40.28	40.49	40.71	40.94	41.18	41.42
Age of beneficiary at death of insured .....	20	21	22	23	24	25	26	27	28	29
Amount of each annual instalment .....	41.68	41.95	42.24	42.53	42.84	43.16	43.49	43.84	44.20	44.58
Age of beneficiary at death of insured .....	30	31	32	33	34	35	36	37	38	39
Amount of each annual instalment .....	44.98	45.39	45.82	46.27	46.73	47.22	47.73	48.25	48.79	49.36
Age of beneficiary at death of insured .....	40	41	42	43	44	45	46	47	48	49
Amount of each annual instalment .....	49.94	50.54	51.17	51.80	52.45	53.12	53.80	54.49	55.19	55.89
Age of beneficiary at death of insured .....	50	51	52	53	54	55	56	57	58	59
Amount of each annual instalment .....	56.60	57.29	57.98	58.66	59.32	59.96	60.58	61.16	61.72	62.23
Age of beneficiary at death of insured .....	60	61	62	63	64	65	66	67	68	69
Amount of each annual instalment .....	62.71	63.15	63.54	63.89	64.20	64.45	64.67	64.85	64.98	65.09
Age of beneficiary at death of insured .....	70	71	72	73 and over.						
Amount of each annual instalment .....	65.16	65.21	65.23	65.25						

6,233.931.

APPLICATION TO THE NEW YORK LIFE  
INSURANCE COMPANY.

1. George Mason.  
(Write name in full.)
1. Residence: State—Mont.  
County—Cascade.  
Town—Great Falls.  
Street—1st Ave. N.  
No.—2200.  
Name of Firm or Employer—Gerald Café.  
(Other Occupation, if any)—None. Send all  
Communications to Res.  
Place of Business—Montana. County—Cascade.  
Town—Great Falls. Street—Central Ave.  
Present Occupation—Manager.  
State exact duties in full—Manager of Gerald  
Café.  
Born at Grand Rapids, Michigan, on 28th day of  
Jan., 1878.  
Married.  
Age nearest birthday—40.  
Race or Nationality—White.

APPLY TO NEW YORK LIFE INSURANCE  
COMPANY FOR INSURANCE AS FOL-  
LOWS:

2. Sum to be insured—\$5,000—Premiums Payable  
Annually.
3. Plan of Insurance—Life 20 Premium with  
Disability and Double Indemnity Benefits.
4. Dividend to be (b) Applied toward payment of  
Premium.

5. I agree that if the Company is unwilling to issue a Policy on the plan applied for at the Company's published premium rate corresponding to my age this application shall be for a Policy on the plan and at the Premium rate corresponding with the Company's valuation of the risks.
6. I designate as Beneficiary to receive the proceeds of Policy in event of death and reserve the right to change the Beneficiary from time to time.—Beneficiary (Give name in full) Evelyn E. Who resides at Great Falls, Montana. Relationship to me—Wife.
7. The following is all the Insurance I now have on my life (if none so state)—Name of Company and Am't: None.
8. No other applicaetion for Insurance and no application for the reinstatement of any insurance, on my life, is now pending except as follows (if none so state): None.
9. No insurance, no application for insurance, or for the reinstatement of insurance on my life have ever been declined except as follows (if none so state): None.
10. No company has ever issued or offered to issue insurance on my life differing from the insurance I applied for, except as follows (if none, so state): None.

I agree as follows: 1. That the insurance hereby applied for shall not take effect unless the first premium is paid and the Policy is delivered to and received by me during my lifetime and good health,

and that unless otherwise agreed in writing, the policy shall then relate back to and take effect as of the date of this application; 2. That any payment made by me before delivery of the policy to, and its receipt by me as aforesaid shall be binding on the Company only in accordance with the terms of the Company's receipt therefor on the receipt form which is attached to this application and contains the terms of the agreement under which said payment has been made and is the only receipt the agent is authorized to give for such payment; 3. That only the President, a Vice-President, a second Vice-President, a Secretary or the Treasurer of the Company can make, modify or discharge contracts, or waive any of the Company's rights or requirements and that none of these acts can be done by [18] the agent taking this application.

Dated at Great Falls, Montana, this 14th Day of  
December, 1917.

Signature of the person applying for Insurance  
(write the name in full)—George Mason.

Witnessed by V. S. Johnstone, Agent.

Other Agents: ———.

Names and Residences of three intimate friends:  
Wm. Grills, John Carey.

NOTICE.—The applicant should deposit with the agent a sum not exceeding the amount of the first premium for the insurance applied for, fill out and sign the following declaration and receive from the agent the Company's official receipt on the official receipt form which is attached hereto for that purpose.

Declaration to be signed by applicant upon making any payment with this application.

7B 218077.

MILITARY BLANK (U. S.)

Name—George Mason.

No. 6,233.931

This Form must be Signed by the Applicant.

NEW YORK LIFE INSURANCE COMPANY.

346 & 348 Broadway, New York.

The NEW YORK LIFE INSURANCE *LIFE INSURANCE* COMPANY will please accept the following questions and answers as part of my application for insurance, dated the Fourteenth Day of December, 1917.

Question 1.

- (a) Are you a member of any Military or Naval organization or Red Cross or other Relief Service? (a) No.
- (b) If so, in what branch of service and in what capacity? (b) No.
- (c) Do you intend to volunteer for any ~~service~~ such service? If so, give particulars. (c) No.
- (d) Are you connected with, or do you intend to take up any form of aviation? If so, give particulars. (d) No. Navy?
- (e) Are you connected with any submarine branch of the ~~service~~ (e) No.

Question 2.

- (a) Are you liable to Military or Naval service of any Country other than the United States? (a) No.

(b) Do you intend to volunteer for such service?

(b) No.

(c) If so, of what country? (c) No.

Question 3.

(a) Have you within the past five years been engaged in any Military or Naval organization? If so, give particulars. No.

(b)

Question 4.

Is any member of your immediate family entirely dependent on you for support?

If so, state particulars. Wife & Baby.

[19]

Question 5.

Do you agree that any policy the Company may issue on your application may, if the rules of the Company so require contain a provision for extra premium or for limiting the liability of the Company if you travel on the high seas engage in Military, Naval, Red Cross or other relief service in experiments with, or ascensions in balloons, aeroplanes or other devices for aerial locomotion; and that if the Policy contains provisions for double indemnity and disability benefits such provisions shall immediately be null and void should you engage in any of the above work or service? Yes.

Dated—Gt. Falls, Mont. 12/14/1917. George Mason,  
Applicate.

Witness—V. S. Johnston.

Forwarded to Division of Policy Issues from ———,  
Branch Office, ———, 191—.

Military—Naval.

Red Cross or Relief Service.

917-43.

6

6,233.931

THIS EXAMINATION MUST BE MADE IN PRIVATE; NO AGENT  
OR THIRD PERSON BEING PRESENT.

(To be filled by the  
medical examiners only)

ANSWERS MADE TO THE MEDICAL EXAMINERS,

In continuation and forming a part of my application for insurance in the  
NEW YORK LIFE INSURANCE COMPANY

1. A. What is your occupation? (Full details.) A. Restaurant Business.
  - B. How long have you been engaged in your present occupation?  
B. 20 years.
  - C. What was your previous occupation? C. Same.
  - D. Do you contemplate making any change, temporary or permanent  
in your occupation? If so, give full detail. D. No.
  2. Do you contemplate changing your residence or making a journey or  
is there any probability that you will do either? (If so, give full  
details.) No.
  3. In what state have you lived the last ten years and which years in  
each? (If outside of the U. S. in what countries and which years  
in each.) Alaska and Montana.
  4. A. Have you now any connection direct or indirect with the manu-  
facture or sale of wines, spirits or malt liquors? A. No.
  - B. Have you *have* any such connections? (If so, in either case give  
full details) B. No.
  5. A. How frequently if at all and in what quantity do you use beer,  
wine, spirits or other intoxicants? A. Does not use them.
- [20]
- B. How frequently if at all and in what quantity have you used any  
of them in the past? B. Same.
  - C. Have you within the last five years used any of them to excess?  
C. No.
  - D. Do you now or have you ever used morphine, cocaine, or any other  
habit forming drug? D. No.
  6. What is the name of the agent through whom you are making appli-  
cation? V. S. Johnston.
  7. A. Has any Life Insurance Company or Society ever examined you  
either on an application for insurance for reinstatement of in-  
surance or for any other reason without issuing or reinstating  
such insurance? A. No.
  - B. Has any Life Insurance or Society ever issued or offered to issue  
a Policy on your Life differing from the one then applied for; or  
have you applied for the reinstatement of a Policy and been  
offered a different contract? B. No.

THE APPLICANT MUST ANSWER THESE QUESTIONS FULLY AND  
WITH SPECIAL CARE.

8. Have you ever suffered from any ailment or disease of,
- |                                                                                                                                                                               | Yes or No. | Name of disease or ailment or injury. | Number of attacks. | Date.                        | Duration. | Severity. | Results and if within five years name and address of every physician consulted. |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------|---------------------------------------|--------------------|------------------------------|-----------|-----------|---------------------------------------------------------------------------------|
| A. The brain or nervous system.                                                                                                                                               | No.        | *                                     | *                  | *                            | *         | *         | *                                                                               |
| B. The heart or lungs.                                                                                                                                                        | No.        | *                                     | *                  | *                            | *         | *         | *                                                                               |
| C. The stomach or intestines, liver, kidneys or bladder,                                                                                                                      | No.        | *                                     | *                  | *                            | *         | *         | *                                                                               |
| D. The skin, middle ear or eyes,                                                                                                                                              | No.        | *                                     | *                  | *                            | *         | *         | *                                                                               |
| E. Have you ever had rheumatism, gout or syphilis?                                                                                                                            | No.        | *                                     | *                  | *                            | *         | *         | *                                                                               |
| B. Have you ever raised or spit blood. (If so, give full details.)                                                                                                            | No.        | *                                     | *                  | *                            | *         | *         | *                                                                               |
| C. Have you ever had any accident or injury.                                                                                                                                  | No.        | *                                     | *                  | *                            | *         | *         | *                                                                               |
| D. Have you ever consulted a physician for any ailment or disease not included in your above answers?                                                                         | No.        | *                                     | *                  | *                            | *         | *         | *                                                                               |
| E. What physician or physicians, if any not named above, have you consulted or been treated by within the last five years and for what illness or ailment? If none, so state. | None.      | Name and address of physician.        |                    | Date and details of illness. |           |           | Results.                                                                        |
|                                                                                                                                                                               |            | *                                     | *                  | *                            | *         | *         | *                                                                               |
10. Family record. Age if living. Condition of health if not good state full details. Age at death. Cause of death. How long ill. Details. Previous health.
- |          |   |    |      |                       |                                                                                                                        |   |      |
|----------|---|----|------|-----------------------|------------------------------------------------------------------------------------------------------------------------|---|------|
| Father   | * | *  | 50   | Killed while hunting. |                                                                                                                        |   | Good |
| Mother   | * | *  | 42   | Cancer Uterus         |                                                                                                                        |   |      |
| Brothers | 0 | *  | *    | *                     | *                                                                                                                      | * | *    |
| Sisters  | 3 | 42 | Good | *                     | Note.—If the death was not due to acute disease give details of last attacks and in case of parents the year of death. |   |      |
|          |   | 36 | Good | *                     |                                                                                                                        |   |      |
|          |   | 34 | Good | *                     |                                                                                                                        |   |      |
11. A. Has any person in your immediate household now ill with consumption? No.  
B. Or has any one of them recently suffered from or died of that disease? B. No.

I AGREE, REPRESENT AND DECLARE on behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, that I have carefully read each and all of the above answers, that they are each written as made by me, that each of them is full, complete and true, and that I am a proper subject for life insurance. Each and all of my said statements, representations and answers contained in this application are made by me to obtain said insurance, and I understand and agree that they are each material to the risk and that the Company believing them to be true will rely and act upon them.

I expressly waive upon behalf of myself and if any person who shall have or claim any interest in any Policy issued hereunder all provisions of law forbidding any Physician or other person who has heretofore attended or examined me or may hereafter attend or examine me from disclosing any knowledge or information which he thereby acquires.

Dated this 15th day of December, 1917.

Signature of the person applying for insurance:

GEORGE MASON.

Witnessed by CLARKE S. SMITH, M. D.,

Medical Examiner. [22]

The petition for removal of said cause contained in said transcript on removal is in the words and figures following, to wit: [23]

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,

Defendant.

### **Petition for Removal.**

To the Honorable, the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade:

Now comes your petitioner, New York Life Insurance Company of New York, the above-named defendant, by its attorneys, Walsh, Nolan & Scallon, and respectfully shows to this Honorable Court that this is a suit of a civil nature at law of which the District Court of the United States for the District of Montana, Great Falls Division, is given jurisdiction by the Judicial Code, Title, "The Judiciary," and your petitioner makes and files this its petition and a bond conditioned as required by law for the purpose of removing said suit from this court into the District Court of the United States for the District of Montana, Great Falls Divi-

sion, and thereupon your petitioner says:

1. That your petitioner, the defendant in said suit, is required by the laws of the State of Montana and the rules of said District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade, in which said suit is brought, to answer or plead to the complaint of the plaintiff within twenty days from and after the service of the summons and complaint of the plaintiff on said defendant, and that said summons and complaint was served on said defendant on, to wit, the 7th day of August, 1919, and that [24] the time has not elapsed within which your petitioner is required by the laws of Montana and the rules and practice of said District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade, to answer, plead or demur to said plaintiff's complaint, nor has your petitioner, the defendant in said cause, either pleaded, answered or demurred to said complaint or otherwise appeared in said suit.

2. That there is a controversy in said suit and that said controversy is between citizens of different states; that the plaintiff in said suit, to wit, the said Evelyn E. Mason, was at the commencement of said suit, thence has been, and still is, a resident, citizen and inhabitant of the State and District of Montana, and of the Great Falls Division of said District, residing at Great Falls, in Cascade County, in said Great Falls Division, and a nonresident of the State of New York and of the Southern District thereof, and that your petitioner, New York Life Insurance Company of New York, New York, the defend-

ant in said suit, was at the commencement thereof, thence has been, and still is, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and a citizen, resident and inhabitant of the State of New York and of the Southern District of New York, and a nonresident of the State and District of Montana and of the Great Falls Division of said District, and that the matter in controversy in this suit exceeds, exclusive of interest and costs, the sum or value of \$3,000.00.

3. That your petitioner now here makes and files with this its petition for removal, a bond in the sum of \$300.00 with good and sufficient surety, conditioned for its entering in the District Court of the United States for the District of Montana, Great Falls Division, within thirty days from the date of filing this its petition, a certified copy of the record in said suit and for paying all costs that may be awarded by said District Court, if said District Court shall hold that said suit was wrongfully or improperly removed thereto, and also for its appearing and entering special bail in said suit, if special bail was originally requisite therein, and that your petitioner has given to the adverse parties written notice of this petition and bond for removal prior to the [25] filing of the same.

Your petitioner therefore prays this Honorable Court to accept this petition and said bond and to proceed no further in said suit except to make an order removing said suit to the United States District Court for the District of Montana, Great Falls Division, and to direct a certified copy of the record here-

in to be made by said Court, as required by law.

And as in duty bound your petitioner will ever pray.

NEW YORK LIFE INSURANCE COMPANY.

By WALSH, NOLAN & SCALLON,  
Its Attorneys.

JAMES H. McINTOSH,  
Of Counsel.

State of Montana,  
County of Lewis and Clark,—ss.

C. B. Nolan, being first duly sworn upon oath, deposes and says: That he is one of the attorneys for the New York Life Insurance Company, the petitioner named in the foregoing petition, and makes this affidavit for and on behalf of said New York Life Insurance Company for the reason that said petitioner is a corporation and none of the officers of said corporation is within the county of Lewis and Clark, wherein affiant now is and resides and where this affidavit is made.

That affiant has read the said petition and knows the contents thereof, and that the matters and things in said petition contained are true to the best of affiant's knowledge, information and belief.

C. B. NOLAN.

Subscribed and sworn to before me this 25th day of August, 1919.

[Seal] ALICE NELSON,  
Notary Public for the State of Montana, Residing at  
Helena, Montana.

My commission expires Feb. 26th, 1922. [26]

To Evelyn E. Mason, Plaintiff in the Foregoing Entitled Action, and to George A. Judson, Her Attorney:

PLEASE TAKE NOTICE that the New York Life Insurance Company of New York, the defendant in said suit and the petitioner aforesaid, will duly file the foregoing petition for removal and the bond therein referred to in the District Court of Cascade County, Montana, and will present said petition and bond to the Honorable Jerry Leslie, Judge of said District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, at Great Falls, on the 27th day of August, 1919, at 10 o'clock A. M., of said day, or as soon thereafter as counsel can be heard, and will there and then move the Court for an order in accordance with the prayer of said petition.

NEW YORK LIFE INSURANCE COMPANY.

By WALSH, NOLAN & SCALLON,

Its Attorneys. [27]

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Thereafter, on October 16, 1919, answer of the defendant was duly filed herein, in the words and figures following, to wit: [28]

In the District Court of the United States, for the  
District of Montana, Great Falls Division.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Defendant.

**Answer.**

Now comes the above-named defendant, and answers the plaintiff's complaint as follows:

For a first defense, defendant alleges:

I.

That the policy alleged in the plaintiff's complaint was issued by the defendant by reason and in consideration of the written application therefor made and signed by the said George Mason in part on the 14th day of December, 1917, and in part on the 15th day of December, 1917, and completed on the last-mentioned day, to wit, the application, of which a copy forms part of Exhibit "A" attached to the plaintiff's complaint herein; that in the said application the said George Mason made the following statements and representations, among others, in answer to questions put to him as follows, to wit:

"5-A. How frequently, if at all, and in what quantity do you use beer, wine, spirits or other intoxicants? A. Does not use them.

- B. How frequently, if at all, and in what quantity have you used and of them in the past? B. Same.
- C. Have you within the last five years used any of them to excess? C. No.
- D. Do you now or have you ever used morphine, cocaine, or other habit-forming drug? D. No."

That in addition to the above, the said George Mason in his said application made the statement and answer that his father had been "killed while hunting"; that [29] the said application also contained the following clause, statements and agreements at the end thereof, and which were signed by the said George Mason on the said 15th day of December, 1917, to wit:

"I AGREE, REPRESENT AND DECLARE, on behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, that I have carefully read each and all of the above answers, that they are each written as made by me, that each of them is full, complete and true, and that I am a proper subject for life insurance. Each and all of my said statements, representations and answers contained in this application are made by me to obtain said insurance, and I understand and agree that they are each material to the risk, and that the Company believing them to be true will rely and act upon them."

That a copy of the said application was, in fact, attached to and made part of the policy of insurance

executed by the defendant and issued to the said George Mason and alleged in the complaint.

## II.

The defendant avers on information and belief that each of the said several statements and representations so made by the said George Mason were false in this, to wit, that it was not true that at the time he made the said application he did not use at all or did not use frequently beer, spirits or other intoxicants, and avers the fact to be that he did use and use frequently beer, spirits and other intoxicants, and had been in the habit of so doing for many years.

That it was not true that the defendant had not used at all or used frequently beer, spirits or other intoxicants in the past, to wit, prior to the making of his said application, and avers, on the contrary, that the said George Mason had in the past, to wit, for many years prior to the making of his said application used and used frequently beer, spirits and other intoxicants; that it was not true that the said George Mason had not used any of them, in the five years preceding the date of his application, to excess; that it was not true that the said George Mason had never used or was not, at the time of making his application, [30] using morphine, cocaine or any other habit-forming drug, and avers that on the contrary that he was at said time and had been for a long time prior thereto, addicted to the use of morphine and other habit-forming drugs; that it was not true that the father of the said George Mason had been killed while hunting, and avers, on the contrary, that the father of the said George Mason had committed sui-

vide; that the said false statements and false representations so made by the said George Mason were made by him wilfully and fraudulently, and with the knowledge that they were false, and with the intent to deceive the defendant and the intent to induce the defendant to enter into the proposed contract of insurance, and to issue to him the said policy of insurance; that the aforesaid false statements so made by the said insured were material to the risk and were believed by this defendant and relied upon by it, and that the said policy was thereafter issued by reason of the said statements and in reliance thereon.

### III.

The defendant further alleges that the said George Mason, in making his said application to this defendant, concealed and at all times thereafter until his death, suppressed and concealed from the defendant the facts about which he had been interrogated, as aforesaid, and concerning which he had made the foregoing answers, and all of said facts; that these facts were material and their suppression and concealment were likewise material; that the defendant was thereby prevented from making inquiries which it would have made if this suppression and concealment had not been made; that by the said suppression and concealment, the said defendant was also prevented from exercising his judgment as to whether or not the said George Mason was a fit subject to be insured by said defendant, and whether the amount of the insurance that he was applying for was excessive or not; that the said Mason falsely and fraudulently omitted to make known the said facts, or any

of them, to the said defendant, with the intent to deceive the defendant, and to induce it to issue said policy; that if the defendant had known the truth about the matters inquired of in the questions above set forth and designated as 5-A, 5-B and 5-C, it would not have issued the said policy without making specific and close inquiries into the habits of the said George Mason, and making further examinations of him, physical and others, to ascertain and [31] determine to what extent, if at all, the use of beer, spirits or other intoxicants, were likely to affect his health or shorten his life, and also how frequently he used any of said liquors to excess, and whether the doing of that was likely to impair his health or shorten his life, and that if the defendant had found that such habits or doings of the said George Mason were likely to impair his health or shorten his life, it would not have issued the said policy to him.

That if the defendant had known that the said George Mason was addicted to the use of morphine or cocaine or other habit-forming drugs, it would not have issued any policy to him at all; that if the said defendant had been informed or had known at the time that the father of said George Mason had committed suicide, it would have made further and detailed inquiries regarding the said George Mason and his mental condition and his physical, business, family and social conditions, before determining whether it would issue to him the policy or not, and that if these inquiries had led defendant to believe or to fear that the said George Mason might have been disposed to

commit suicide, it would not have issued any policy to him.

#### IV.

That this defendant did not know and did not learn until after the death of the said George Mason the truth about any of the matters hereinbefore alleged.

#### V.

The defendant, without admitting any obligation so to do, is able and willing to return, and hereby offers to return to whomsoever may be entitled thereto, the premium paid by the said George Mason to obtain the said policy, as well as the premium subsequently paid by him, amounting in the aggregate to the sum of four hundred and forty-five dollars (\$445.00), and hereby offers to bring the same into court.

That the said George Mason left a will, and that the same has been probated in the district court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, and that the said Evelyn E. Mason has been appointed and has qualified as executrix, and is now acting as such;

That the defendant has heretofore and before the commencement of this suit, tendered the said sum to the said [32] Evelyn E. Mason, but that she refused and declined to accept the same.

That the defendant now brings said sum into court, and that if, for any reason, said sum should be found insufficient, said defendant offers to make up and pay any additional sum that may be required and to do anything and everything else that may be required

of it in the premises, in pursuance of this defense and in conformity therewith.

And for another and separate defense, the defendant:

### I.

Admits that Exhibit "A" attached to the complaint is substantially a copy of the policy alleged in the complaint and issued by the defendant to said George Mason, but for greater certainty, the defendant refers to the original and prays that it be produced at the trial.

### II.

Avers that the said policy was issued in consideration of the application, statements and representations included in and forming part of the application for said policy made and presented to the said company by the said George Mason, as well as of the premium paid by him.

The defendant avers that part of the consideration for which the said policy was issued failed through the fault of the said George Mason in this, to wit, that the statements and representations made by the said George Mason in his application were and are false in the following particulars, to wit:

That the policy alleged in the plaintiff's complaint was issued by the defendant by reason and in consideration of the written application therefor made and signed by the said George Mason in part on the 14th day of December, 1917, and in part on the 15th day of December, 1917, and completed on the last-mentioned day, to wit, the application, of which a copy forms part of Exhibit "A" attached to the plaintiff's com-

plaint herein; that in the said application the said George Mason made the following statements and representations, among others, in answer to questions put to him as follows, to wit:

“5.—A. How frequently, if at all, and in what quantity do you use beer, wine, spirits or other intoxicants. A. Does not use them. [33]

B. How frequently, if at all, and in what quantity have you used any of them in the past? B. Same.

C. Have you, within the last five years, used any of them to excess? C. No.

D. Do you now or have you ever used morphine, cocaine, or other habit-forming drug? D. No.”

That in addition to the above, the said George Mason in his said application made the statement and answer that his father had been “killed while hunting”; that the said application also contained the following clause, statements and agreements at the end thereof, and which were signed by the said George Mason on the said 15th day of December, 1917, to wit:

“I AGREE, REPRESENT AND DECLARE, on behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, that I have carefully read each and all of the above answers, that they are each written as made by me, that each of them is full, complete and true, and that I am a proper subject for life insurance. Each and all of my said statements, representations and answers contained in

this application are made by me to obtain said insurance, and I understand and agree that they are each material to the risk, and that the Company believing them to be true will rely and act upon them.”

That a copy of the said application was, in fact, attached to and made part of the policy of insurance executed by the defendant and issued to the said George Mason and alleged in the complaint.

### III.

The defendant avers on information and belief that each of the said several statements and representations so made by the said George Mason were false in this, to wit, that it was not true that at the time he made the said application he did not use at all or did not use frequently beer, spirits or other intoxicants, and avers the fact to be that he did use and use frequently beer, spirits and other intoxicants, and had been in the habit of so doing for many years. [34]

That it was not true that the defendant had not used at all or used frequently beer, spirits or other intoxicants in the past, to wit, prior to the making of his said application, and avers, on the contrary, that the said George Mason had in the past, to wit, for many years prior to the making of his said application used and used frequently beer, spirits and other intoxicants; that it was not true that the said George Mason had not used any of them, in the five years preceding the date of his application, to excess; that it was not true that the said George Mason had never used or was not, at the time of making his application, using morphine, cocaine or any other habit-

forming drug, and avers that on the contrary that he was at said time and had been for a long time prior thereto, addicted to the use of morphine and other habit-forming drugs; that it was not true that the father of the said George Mason had been killed while hunting, and avers, on the contrary, that the father of the said George Mason had committed suicide; that the said false statements and false representations so made by the said George Mason were made by him wilfully and fraudulently, and with the knowledge that they were false, and with the intent to deceive the defendant and the intent to induce the defendant to enter into the proposed contract of insurance, and to issue to him the said policy of insurance; that the aforesaid false statements so made by the said insured were material to the risk and were believed by this defendant and relied upon by it, and that the said policy was thereafter issued by reason of the said statements and in reliance thereon.

#### IV.

The defendant further alleges that the said George Mason in making his said application to this defendant, concealed and at all times thereafter until his death, suppressed and concealed from the defendant the facts about which he had been interrogated, as aforesaid, and concerning which he had made the foregoing answers, and all of said facts; that these facts were material and their suppression and concealment were likewise material; that the defendant was thereby prevented from making inquiries which it would have made if this suppression and concealment had not been made; that by the said suppression and con-

cealment, the said defendant was also prevented from exercising its [35] judgment as to whether or not the said George Mason was a fit subject to be insured by said defendant, and whether the amount of the insurance that he was applying for was excessive or not; that the said Mason falsely and fraudulently omitted to make known the said facts, or any of them, to the said defendant, with the intent to deceive the defendant, and to induce it to issue said policy; that if the defendant had known the truth about the matters inquired of in the questions above set forth and designated as 5-A, 5-B, and 5-C, it would not have issued the said policy without making specific and close inquiries into the habits of the said George Mason, and making further examinations of him, physical and others, to ascertain and determine to what extent, if at all, the use of beer, spirits or other intoxicants, were likely to affect his health or shorten his life, and also how frequently he used any of said liquors to excess, and whether the doing of that was likely to impair his health or shorten his life, and that if the defendant had found that such habits or doings of the said George Mason were likely to impair his health or shorten his life, it would not have issued the said policy to him.

That if the defendant had known that the said George Mason was addicted to the use of morphine or cocaine or other habit-forming drugs, it would not have issued any policy to him at all; that if the said defendant had been informed or had known at the time, that the father of said George Mason had committed suicide, it would have made further and de-

tailed inquiries regarding the said George Mason and his mental condition and his physical, business, family and social conditions before determining whether it would issue to him the policy or not, and that if these inquiries had led defendant to believe or to fear that the said George Mason might have been disposed to commit suicide, it would not have issued any policy to him.

#### VI.

Alleges that the proofs which the plaintiff did furnish and present to the defendant were false and misleading in material particulars, that is to say, that the death of the insured was due to self-destruction, and that the said insured committed suicide, and that his death was not due to natural [36] causes, but that the proofs did not state any of these facts and concealed the same, and that they did not truly state the cause of the death of the said insured; that thereby the proofs tended to mislead and deceive the defendant.

#### VI.

Denies that the sum of five thousand dollars (\$5,000.00) is due or ever has been due from the defendant to the plaintiff or to anyone on account of the policy of insurance alleged in the complaint, or on any account, and denies that there is now or ever was due from the defendant to the plaintiff, or to anyone on account thereof, more than four hundred and forty-five dollars (\$445.00).

And for another and separate defense, the defendant alleges:

I.

That the policy alleged in the complaint contains the following provisions, to wit:

“Self-destruction.—In event of self-destruction during the first two insurance years, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company and no more.”

That the said clause appears in Exhibit “A” attached to the plaintiff’s complaint herein.

II.

Defendant avers on information and belief that the said George Mason did not die a natural death, but, on the contrary, his death was caused by self-destruction; that is to say, that the said George Mason committed suicide and destroyed his own life by shooting himself with a pistol.

III.

That only two premiums had been paid to defendant under or on account of said policy up to the time of the death of the said George Mason, which [37] premiums amounted to the sum of \$445.00; that the defendant has ever been ready and willing to pay the said sum of \$445.00 and did, prior to the commencement of the suit, tender and offer to pay the same to the plaintiff, but that the said payment was refused; that the said defendant now brings the said sum into court with this its answer.

WHEREFORE the defendant prays that plaintiff’s action herein be dismissed with costs.

WALSH, NOLAN & SCALLON,

Attorneys for Defendant. [38]

State of Montana,  
County of Lewis and Clark,—ss.

Wm. Scallon, being first duly sworn upon oath, deposes and says: That he is one of the attorneys for the New York Life Insurance Company, the defendant named in the foregoing entitled action, and makes this verification for and in behalf of the said defendant; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

That the reason this verification is made by deponent and not by defendant is that defendant is a corporation and none of its officers are within the county of Lewis and Clark, wherein deponent is and resides.

WM. SCALLON.

Subscribed and sworn to before me this 15th day of October, 1919.

[Seal]

H. G. PICKETT,

Notary Public for the State of Montana, Residing  
at Helena, Montana.

My commission expires February 26, 1921.

Filed Oct. 16, 1919. C. R. Garlow Clerk. [39]

Thereafter, on November 7th, 1919, reply to answer was duly filed herein, being in the words and figures following to wit: [40]

In the District Court of the United States, for the  
District of Montana, Great Falls Division.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE CO., a Corpora-  
tion.

### **Reply.**

Now comes the above-named plaintiff and for reply to the answer of the defendant filed herein alleges:

#### **I.**

That she has not sufficient knowledge or information upon which to form a belief as to the allegations set forth in the first paragraph of the defendants said answer and therefore denies the same.

#### **II.**

Plaintiff denies each and every allegation, matter and thing set forth in the second paragraph of defendants said answer and the whole of each and every part thereof.

#### **III.**

As to the allegations set forth in the first paragraph of paragraph marked three of defendants answer, plaintiff alleges that she has no knowledge or information thereof sufficient to form a belief and therefore denies the same.

## IV.

Plaintiff specifically denies each and every allegation and each and every part of each and every allegation set forth in the fourth paragraph of defendants' said answer [41]

## V.

Plaintiff admits that the said George Mason left a will and that the same has been probated in the District Court of the Eighth Judicial District of the State of Montana in and for the County of Cascade, and that the said Evelyn E. Mason has been appointed and has qualified as executrix and is now acting as such.

Further replying to the allegations of paragraph five this plaintiff denies each and every allegation therein set forth except as hereinafter specifically admitted, qualified or denied.

## VI.

Replying to the defendants alleged separate defense, plaintiff alleges that she has no knowledge or information thereof sufficient to form a belief as to the allegations of the second paragraph of said alleged separate defense and therefore denies the same.

## VII.

Plaintiff specifically denies each and every allegation and each and every part of each and every allegation set forth in the third paragraph of defendants' alleged separate defense.

## VIII.

Plaintiff specifically denies the allegations set forth in the fourth paragraph of defendants alleged separate defense.

IX.

Plaintiff specifically denies the allegations set forth in paragraph six of said separate defense and the whole and each and every part thereof. [42]

Further replying to that portion of defendant's said action which is alleged as another and separate defense: Plaintiff admits the first paragraph of said second alleged separate defense but denies each and every other allegation, matter and thing set forth in defendant's alleged second separate defense as the whole and each and every part thereof.

X.

Plaintiff denies each and every allegation and each and every part of each and every allegation set forth in defendant's said answer except as herein specifically admitted qualified or denied.

WHEREFORE, plaintiff having fully replied to defendant's answer, prays judgment as demanded in her complaint.

GEORGE A. JUDSON,  
Attorney for Plaintiff. [43]

State of Montana,  
County of Cascade,—ss.

Evelyn E. Mason, being first duly sworn, upon oath, deposes and says:

That she is the plaintiff named in the foregoing action; that she has read the foregoing reply and knows the contents thereof; that the matters and things therein stated are true to the best of her knowledge except as to those matters therein stated

on information and belief and as to those matters she believes it to be true.

EVELYN E. MASON.

Subscribed and sworn to before me this 4th day of Nov., A. D. 1919.

[Seal]

GEORGE A. JUDSON,

Notary Public for the State of Montana, Residing at  
Great Falls.

My commission expires Apr. 1, 1920.

Filed Nov. 7, 1919. C. R. Garlow, Clerk. [44]

Thereafter, on December 22, 1919, motion for leave to strike from the answer and file a substituted answer was duly filed herein in the words and figures following, to wit:

In the District Court of the United States in and  
for the District of Montana.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Defendant.

**Motion for Leave to Strike from Answer and File  
Substituted Answer.**

Now comes the above-named defendant and moves this Honorable Court to be permitted to strike from its answer herein all of the first defense therein set forth; also all of the second defense therein set forth,

and for leave to file *nunc pro tunc* a substitute answer in conformity with the foregoing, to wit, an answer omitting the first and second defenses set forth in such original answer.

WALSH, NOLAN and SCALLON,  
FLETCHER MADDOX,

Attorneys for Defendant.

Filed December 22, 1919. C. R. Garlow, Clerk.  
By H. H. Walker, Deputy. [45]

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Thereafter, on December 22, 1919, at the trial of said cause, by leave of Court, the complaint was amended by interlineation and substituted answer filed, the journal record thereof being in the words and figures following, to wit:

In the District Court of the United States in and  
for the District of Montana.

No. 783.

EVELYN E. MASON

vs.

NEW YORK LIFE INS. CO.

**Order Allowing Amendment to Complaint and  
Answer.**

This cause came on regularly for trial this day, Geo. A. Judson, Esq., appearing for plaintiff, and Wm. Scallon, Esq., and Fletcher Maddox, Esq., appearing for the defendant. \* \* \* Thereupon defendant filed and presented a written motion to

strike from its answer and to file *nunc pro tunc* a substitute answer herein, and there being no objection, the motion was granted and such substituted answer filed, the reply heretofore filed to stand as the reply to the substituted answer. Thereupon, by consent, plaintiff was granted leave to amend her complaint by interlineation. \* \* \*

Entered in open court, December 22, 1919.

C. R. GARLOW,  
Clerk. [46]

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Thereafter on December 22, 1919, amended and substituted answer was duly filed herein in the words and figures following, to wit:

In the District Court of the United States in and  
for the District of Montana.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Defendant.

**Amended and Substituted Answer.**

Now comes the above-named defendant, and by leave of Court first had and obtained, files this, its amended and substituted answer as follows:

The defendant alleges:

I.

That the policy alleged in the complaint contains the following provision, to wit:

“Self-destruction.—In the event of self-destruction during the first two insurance years, whether the insured be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company and no more.”

That the said clause appears in Exhibit “A” attached to the plaintiff’s complaint herein.

II.

Defendant avers on information and belief that the said George Mason did not die a natural death, but, on the contrary, his death was caused by self-destruction; that is to say, that the said George Mason committed suicide and destroyed his own life by shooting [47] himself with a pistol.

III.

That only two premiums had been paid to defendant under or on account of said policy up to the time of the death of the said George Mason, which premiums amounted to the sum of Four Hundred Forty-five Dollars (\$445.00); that the defendant has ever been ready and willing to pay the said sum of money, and did, prior to the commencement of the suit, tender and offer to pay the same to the plaintiff, but that the said payment was refused; that the said defendant now brings the said sum into court with this, its answer.

WHEREFORE, the defendant prays that plaintiff’s action herein be dismissed with costs.

WALSH, NOLAN & SCALLON,  
FLETCHER MADDON,

Attorneys for Defendant. [48]

State of Montana,  
County of Cascade,—ss.

Wm. Scallon, being first duly sworn upon oath, deposes and says: That he is one of the attorneys for the New York Life Insurance Company, a corporation, the defendant named in the foregoing entitled action, and makes this verification for and in behalf of the said defendant; that he has read the foregoing answer and knows the contents thereof; and that the same is true to the best of his knowledge, information and belief.

That the reason this verification is made by deponent, and not *be* defendant, is that defendant is a corporation and none of its officers are within the county wherein deponent is.

WM. SCALLON.

Subscribed and sworn before me this 22d day of December, 1919.

C. R. GARLOW,  
Clerk United States District Court, District of Montana.

Filed December 22, 1919, *nunc pro tunc*, as of Oct. 16, 1919. C. R. Garlow, Clerk. By H. H. Walker, Deputy. [49]

Thereafter, on December 23, 1919, the verdict of the jury was duly rendered and entered herein, in the words and figures following, to wit:

In the District Court of the United States in and  
for the District of Montana.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Defendant.

**Verdict.**

We, the jury in the above-entitled cause, find for the plaintiff and against the defendant for the sum of \$5,000.00, and interest from the 12th day of May, A. D. 1919, at the rate of 8% per annum.

GORDON FERGUSON,

Foreman of the Jury.

Filed Dec. 23, 1919. C. R. Garlow, Clerk. By  
H. H. Walker, Deputy. [50]

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Thereafter, on December 26, 1919, judgment was duly rendered and entered herein in the words and figures following, to wit:

In the District Court of the United States in and  
for the District of Montana.

No 783.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Defendant.

### **Judgment on Verdict.**

This action came on regularly for trial at Great Falls, Montana, on the 22d day of December, A. D. 1919, the said parties appeared by their attorneys, George A. Judson and H. R. Eickemeyer, counsel for the plaintiff, and William Scallon and Fletcher Maddox, counsel for the defendant. A jury of twelve persons was regularly empaneled and sworn to try said cause. Witnesses on the part of the plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into court, the following verdict, to wit: [51]

In the District Court of the United States in and  
for the District of Montana.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Defendant.

VERDICT.

We, the jury in the above-entitled cause, find for the plaintiff and against the defendant for the sum of \$5,000.00 and interest from the 12th day of May, A. D. 1919, at the rate of 8% per annum.

GORDON FERGUSON,

Foreman of the Jury."

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed, that the plaintiff do have and recover from said defendant, the sum of \$5,000.00, with interest thereon from the 12th day of May, 1919, at the rate of 8% per annum and her costs and disbursements taxed and allowed for the sum of \$61.95.

Judgment entered this 26th day of December, A. D. 1919.

C. R. GARLOW,

Clerk of said Court. [52]

Thereafter, on March 16th, 1920, defendant's bill of exceptions was duly settled, allowed and filed herein, being in the words and figures following, to wit: [53]

In the District Court of the United States for the  
District of Montana.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Defendant.

**Defendant's Bill of Exceptions.**

BE IT REMEMBERED that the above-entitled cause came regularly on for trial in the above-entitled court on the 22d day of December, 1919, at Great Falls, Montana, the Honorable George M. Bourquin, Judge, presiding. Mr. George A. Judson and Mr. H. R. Eickemeyer appeared as attorneys for the plaintiff, and Messrs. Walsh, Nolan & Scallon and Mr. Fletcher Maddox appeared as attorneys for the defendant. On motion of the defendant, the Court ruled that the defendant had the right to open and close. Thereupon a jury of twelve persons was called, empanelled and sworn to try the cause. Thereupon the following proceedings were had and the following evidence, and none other, was introduced, and the following sets forth all of the evidence introduced by the respective parties on the

trial of the said cause or offered on the part of the defendant and excluded, to wit: [54]

DEFENDANT'S CASE.

**Testimony of Dr. Richard B. Durnin, for Defendant.**

DR. RICHARD B. DURNIN, called and sworn as a witness for and on behalf of the defendant, in answer to the questions put to him, testified as follows:

Direct Examination.

Mr. SCALLON.—Q. Dr. Durnin, will you state your full name? A. Richard Brown Durnin.

Q. Doctor, please state out loud so the jurors will hear you distinctly. You are a physician and surgeon? A. I am.

Q. How long have you been in practice?

A. Eleven years.

Q. Where?

A. Nine and a half years here and two years in the hospitals.

Q. You are a graduate physician?

A. Of Toronto University, Medical College.

Q. Did you know the deceased George Mason, about whom we are speaking in this case? A. Yes.

Q. Did you attend him? A. I did.

Q. At any time in the month of May of this year?

A. I did.

Q. Will you state what occurred?

A. I was called about 3:30 in the afternoon by Oscar Frederickson from my office; I went up with Oscar Frederickson in my automobile to his house. When I arrived there Mrs. Mason met us either at the

(Testimony of Dr. Richard B. Durnin.)

front door or in the front room. I had already been told—

The COURT.—Not what you had been told.

A. I went into the bedroom, saw George Mason lying in the bed, examined him, found that he had received two wounds in the front left side of the body, a short distance below the heart, that he evidently was suffering from loss of blood internally, very little blood externally. I examined back of his body to find whether the bullets had come out and I [55] saw where there were two openings in his union suit. I decided that it was a—(interrupted, then continuing:)

A. I phoned for the ambulance and took him to the Deaconess Hospital, where he was operated on, and found that his abdomen was full of blood, that the principal injury done in the abdomen was from a bullet cutting the spleen practically half in two,—the spleen being a very vascular organ it bled a very great deal into his abdominal cavity. He was in very poor condition; no extensive work could be done; we put a pack against the spleen to stop the hemorrhage; ordinarily we would have put sutures in the spleen; his condition was such that the quicker way we could stop the hemorrhage the better chances he would have. He did not recuperate and died before he left the operating-table.

Q. Now, Doctor, will you please describe the wounds as to their courses through the body, the entrance and exit? A. May I refer to my notes?

The COURT.—Made at the time or afterwards?

(Testimony of Dr. Richard B. Durmin.)

A. Shortly afterwards.

The COURT.—While fresh in your recollection?

A. Yes.

Q. (By Mr. SCALLON.) Did you perform an autopsy on him? A. I did.

Q. When? A. The evening before the inquest.

Q. Can you give the date? A. May 6th, 1919.

Q. Was it the same day on which he died or the next day?

A. I rather think it was two days after.

Q. Two days after?

A. I rather think it was, two days after.

Q. Anyhow, you performed the autopsy?

A. Yes, sir.

Q. You may proceed to describe the wounds.

A. The inner bullet wound entered one inch to the left of the median line, that is the center line of the body, one inch to the left; it went through the front anterior portion of the diaphragm; the diaphragm is the muscle between the abdominal cavity and the chest or thoracic cavity; through [56] the left border of the liver, through the stomach, through the upper and outer part of the left kidney, through the intercostal space behind, passing out three inches from the spine. The outer bullet wound, the entrance was two and one-half inches to the left of the median line, through the sixth intercostal space, almost severing the intercostal artery, touching the lower part of the pericardial sac—the pericardial sac is the sac surrounding the heart—through the diaphragm, through the spleen, cutting it almost in two,

(Testimony of Dr. Richard B. Durnin.)

again through the diaphragm, through the lower border of the lobe of the left lung, through the ninth intercostal space, passing out about six inches to the left side. The pleura cavity of the left side was filled with a large quantity of blood.

Q. Doctor, were the points of exit on the left side of the spine or on the right side?

A. On the left side.

Q. On the left side? Were they farther away from the spine itself, the line of the spine, than the hole where the bullets went in? A. They were.

Q. The course, then, if I understand you, would be what—outward or inward?

A. To the left outward.

Q. Outward; and were they up or down?

A. Slightly down.

Q. Slightly down. Now, I will ask you to state, what, if anything, Mrs. Mason said when you went into the house?

A. Well, of course, it is hard for me to remember what was said when she met me at the door or the front room. She told me that Mr. Mason was in the bedroom, that he was shot. I know positively she did not have time to tell very much because I went very quickly from the front door to see the patient himself; she showed the way. I don't recall anything further.

Q. At that time? A. Yes.

Q. Well, now, what, if anything, did she say or do about a pistol?

A. Later I asked where the gun was, and either she

(Testimony of Dr. Richard B. Durnin.)

or Oscar Frederickson— [57]

Mr. JUDSON.—Just a minute; anything that any other person said is hearsay, and ask to have it stricken out; I couldn't anticipate it beforehand, and ask the witness not to testify to anything said by any other person.

The COURT.—Not what any other person may have done or said.

Q. What she said, if you remember, or did?

A. I found the gun in the buffet drawer.

Mr. JUDSON.—We ask to have that stricken out as not responsive to the question; what she said is what he asked.

The COURT.—Let it be stricken.

A. Your Honor, I can't tell which told me that particular thing.

The COURT.—I didn't know, but what? The location of the gun.

A. Yes.

Q. Was she present when it was told to you?

A. Yes.

The COURT.—I think he may answer as to that. I cannot imagine there will be any dispute over the gun.

A. Either she or Oscar Frederickson told me where the gun was.

Q. And what did you do? A. I got the gun.

Q. What sort of a gun was it?

A. It was a Colt automatic.

Q. Do you remember the caliber?

A. I do not. I am not familiar with revolvers.

(Testimony of Dr. Richard B. Durnin.)

Q. What did you do with it?

A. I put it in my pocket.

Q. And later what did you do with it? Just tell us what you did with the gun from that time on?

A. From that time I put it in my pocket, I took it over to the Deaconess' Hospital; there is a locker in the doctors' dressing-room or scrubbing-up room; I took and put a sheet of adhesive plaster round the gun and wrote my name on the adhesive plaster and put it on a shelf on the upper part of one of those lockers. The day of the inquest I took the gun and gave it to either the coroner or the sheriff without opening the gun, doing anything with it any further than putting the safety catch on. [58]

Q. Have you seen it since?

A. I saw it the night of the inquest. From that time I have not seen it.

Q. Do you remember how Mr. Mason was dressed when you saw him?

A. As I recall, he had his trousers, union suit and a shirt.

Q. Union suit of underwear, do you mean?

A. Yes.

Q. What marks did you see, if any, upon this clothing?

A. I saw where two bullets had come out of the back of his union suit.

Q. Anything in front?      A. No.

Q. Did it have sleeves or not, the union suit?

A. I cannot recall.

(Testimony of Dr. Richard B. Durnin.)

Q. Did you notice any marks upon the body other than the holes?     A. No.

Q. State whether or not there was anything that might have been a powder burn?

A. Around the bullet holes there was, it was darkened, apparently burnt with powder for about half to three-quarters of an inch surrounding the hole.

Q. Did you notice any other mark on the body that might have been produced by the powder or the flash of the gun or the hot gases?     A. No.

Q. When you laid him on the operating-table was he stripped for the purpose?     A. Yes.

Q. Did you notice his arms at the time?

A. Not particularly, no, at that time.

Q. Now, Doctor, will you state what, if anything, Mr. Mason himself said to you?

Mr. EICKEMEYER.—That is objected to on the ground and for the reason it was a privileged communication.

Mr. SCALLON.—I will modify the question, if your Honor, please.

Q. Regarding the manner in which he was shot.  
[59]

Mr. EICKEMEYER.—That is objected to.

The COURT.—Let him state his question.

Q. And who had done the shooting?

A. I asked Mr. Mason, "Who did this?" As I recall his words, he said, "I did it myself; I shot myself twice."

Q. Now, where did this conversation take place?

A. In his room at his house.

(Testimony of Dr. Richard B. Durmin.)

Q. How long after you had got there?

A. Well, within five minutes.

Q. Now, who, if anybody, accompanied you on your way to the hospital?

A. Oscar Frederickson—pardon me, I didn't understand the question.

Q. Who accompanied you? Did anybody go with you in the car to the hospital? A. Yes.

Q. Who? A. Mrs. Mason.

Q. Whose car was it? A. My car.

Q. Now, what, if anything, was said by Mrs. Mason at that time on the way to the hospital?

A. Mrs. Mason, as I recall, told me about Mr. Mason coming home from work and that he wasn't feeling very well and that she—

A. (Continued.) —that she said to him, "If you don't feel like going to work, don't go to work."

Q. Proceed, Doctor, and state fully.

A. Yes, I was just—it isn't fresh in my memory, you know. She also remarked that she knew of no reason why he should have done this.

Q. What, if any, other statements of his, did she repeat to you, or purport to repeat to you, regarding his health and his feelings.

A. Yes; she said, "It is a pretty hard thing for a man not feeling any better than I do," or words to that effect, "having to work."

Q. Well, can you recall the exact words which she used? A. No, I cannot. [60]

The COURT.—Is this what he said to you?

(Testimony of Dr. Richard B. Durnin.)

A. No, this is what she said to me on the way to the hospital.

Q. Now, what, if anything else, did she say?

A. I cannot recall.

Q. As to how it happened?

A. Yes; she spoke of a note that she found; now, where she stated that note was found, I didn't pay very much attention.

Q. A note by whom, from whom?

A. A note written by Mr. Mason that afternoon; whether it was before or after he had been shot I would not say.

Q. Did she state anything regarding the contents of the note?     A. I do not recall that she did.

Q. Doctor, from your observations of Mr. Mason, can you say whether he would have been able to write a note after being shot?     A. Yes.

Q. How much strength did he have left when you found him?

A. He had not a great deal of strength left, but he had strength enough left to answer questions intelligently; he did not appear very anxious to talk, naturally, a man in his condition would not. From what I had been told regarding him being found in the basement and being helped up by his wife to the room, I should say he would be perfectly able to write a note.

Q. Now, who had told you this?

A. Mrs. Mason brought that part out at the examination at the inquest; she did not tell me, to my knowledge, that she helped him upstairs.

(Testimony of Dr. Richard B. Durnin.)

Q. It was later that you heard her say that?

A. Yes.

Q. But I am speaking now about the time of the occurrence itself.

A. She did not tell me then that she had helped him up.

Q. What, if anything, did anybody say in her hearing about the place where the shooting occurred, at the time that you were at the house?

A. Mrs. Mason and I were not in the room at all the time together during the time I was at the house; she was in the front room when I was in with Mr. Mason alone, and I believe that she was with Mr. Mason [61] alone when I was in the front room.

Q. What I am trying to get at was whether any explanation of the occurrence was given to you at that time in her hearing?

A. No, there was nothing definite; if it was said it would probably be said to Oscar Frederickson, and I wasn't paying attention to it, I was paying attention to the patient.

Q. How was Mr. Mason's mind?      A. Clear.

Cross-examination.

Mr. JUDSON. — Q. Doctor, what was Mrs. Mason's condition at that time that you saw her up there and the time you were talking to her?

A. Well, when I came to the door Mrs. Mason was crying, seemed nervous and upset, naturally.

Q. Was she nearly hysterical?

A. Well, she had pretty good use of her mental faculties; she was very nervous; she did not throw any

(Testimony of Dr. Richard B. Durnin.)

fits or anything of that nature, still she was quite nervous.

Q. Now, Doctor, when you were at the house and when you were going from the house to the hospital, your mind was on the patient, was it not?

A. Yes, sir.

Q. Your patient; and you did not pay any very particular attention to what may have been said by anyone else?

A. No; another thing, it was a very short trip.

Q. You were driving the car about as fast as you could drive a trip like that?     A. Yes, sir.

Q. Now, was Mr. Mason a pretty sick man at the time you saw him, first saw him?     A. Yes, sir.

Q. Could you tell how long before that he had received these wounds, Doctor?

A. I would say from the complete observation of the case, from the time that I had seen him up till the time that he was operated on, that [62] it would not be over 15 minutes to half an hour.

Q. But you would be unable to say—that is from the time you first saw him, you mean?     A. Yes.

Q. But as to that you are not positive, of course?

A. Because from the fact that a hemorrhage of the spleen they don't last very long.

Q. At the time you were at the inquest, Doctor, you did not make any statements in regard to anything you claim Mrs. Mason had said to you while you were in the car?     A. I do not recall.

Q. Your memory at that time of course would be fresher than at any other time, wasn't it?

(Testimony of Dr. Richard B. Durnin.)

A. Yes, sir.

Redirect Examination.

Mr. SCALLON.—Q. You say you do not recall what was said at the inquest?

A. I do not recall what was said; I do not recall whether I said anything regarding Mrs. Mason's conversation with me to the hospital.

Q. But whether you were asked anything about it—

A. If I had been asked about it I made the statement.

Q. And if you weren't asked, you did not?

A. If I weren't asked I did not make the statement.

[63]

### **Testimony of J. B. Clark, for Defendant.**

J. B. CLARK, called and sworn as a witness for and on behalf of the defendant, in answer to the questions put to him testified, in substance, as follows:

Direct Examination.

Mr. SCALLON.—My full name is J. B. Clark. I am connected with the Postal Telegraph and Cable Company at Great Falls. I have been with them since the second of February, 1916. I have been subpoenaed to bring with me the original of a telegram and I have it with me.

(Witness produces telegram which is marked Exhibit No. 1, Deft.)

By our record it indicates that one of our messengers delivered it to the Telegraph Company. I made

(Testimony of J. A. Curry.)

a charge to J. A. Curry for it in pursuance of directions on the face of the telegram.

(No cross-examination.) [64]

**Testimony of J. A. Curry, for Defendant.**

J. A. CURRY, called and sworn as a witness for and on behalf of the defendant, in answer to the questions put to him testified as follows:

Direct Examination.

Mr. SCALLON.—Q. Mr. Curry, state your full name.

A. John A. Curry.

Q. Your business.

A. I am city editor of the "Tribune."

Q. City editor of the "Tribune"? A. Yes, sir.

Q. How long have you been at that capacity?

A. Just about nine years.

Q. Do you know the plaintiff here—Mrs. Mason?

A. Yes, sir.

Q. How long have you known her?

A. I think about seven or eight years, six or seven,—I don't know just exactly how long.

Q. Where? A. In Great Falls.

Q. Did you know Mr. Mason? A. Yes, sir.

Q. How long had you know him?

A. Just about the length of time I have been in the city.

Q. Were you a visitor at their house?

A. Yes, sir.

Q. State that nature of your relations; were they friendly or not, close or not.

(Testimony of J. A. Curry.)

A. Well, yes, I would say so; I ate at the Café, where he was manager, every night for some eight years and a half, that is while he was there; of course he wasn't there all that time; he was away for a couple or three years, but he was manager at the time that I came.

Q. Now, will you state what you had to do with the sending of the paper marked for identification Exhibit No. 1 for defendant?

A. Well, I don't know that I would say I had anything, but sending it for the defendant (plaintiff); I wrote it and sent it and paid for it. [65]

Q. You wrote it and sent and paid for it?

A. Yes, sir.

Q. By whose direction?

A. I did it on my own direction as a friend of the deceased.

Q. From whom did you get the information?

A. I got the information—I happened to know—Mr. JUDSON.—What information?

Q. The information upon which this telegram is based.

A. The information on which the telegram was based was largely street information that I got before I went to the hospital.

Q. Then did you go to the hospital?

A. Yes, I was to the hospital, I was called to the hospital, by, I take it, the telephone porter there.

Q. Did you see Mrs. Mason there?

A. Yes, I saw Mrs. Mason.

Q. Did you speak with her?

(Testimony of J. A. Curry.)

A. Well, in so far as talking with a hysterical woman is concerned, yes.

Q. Well, did you speak with her?

A. I say I did.

Q. Did you know the person to whom this was addressed?

A. I had not met that person until afterwards; I knew the person's name from having talked with Mr. Mason about his sister.

Q. Well, do you pretend to say, Mr. Curry, that you undertook to send this telegram, with the name that is signed to it, without having talked to Mrs. Mason about it?

A. I am not making any pretense about it. I told you how it happened.

Q. You felt authorized by her to send this telegram?

A. I can't say that I felt authorized by her; I felt interested in the family and I sent the telegram and I paid for it.

Q. Did you tell her about it? [66]

A. I don't know that I did tell her about it on that particular day.

Q. Later, did you tell her about it?

A. Well, I think likely that when I got a telegram in answer to that, that I handed it to her.

Q. Who was referred to here by the name which was used in this telegram?

A. I know the name. The name is intended to refer to Mrs. Mason.

Q. To Mrs. Mason or Mr. Mason?

(Testimony of J. A. Curry.)

A. Which one?

Q. First one.

A. The first one is intended to refer to Mr. Mason.

Q. And the name that was signed?

A. That is intended to refer to Mrs. Mason.

Q. Do I understand that this was sent after you had seen Mrs. Mason that night, after you had been to the hospital?

A. Yes. I wouldn't say just the time; I would say some time about 8 o'clock.

Q. And you had been up to the hospital when?

A. I think I was at the hospital about—I don't know for certain—some time between five and six or between five and six-thirty.

Q. And you sent it about eight?

A. Well, the telegram is the best evidence as to when I sent it.

Q. Well, you might look at it.

A. I don't know that I would know their marks. You know as much about telegrams as I do. You know they carry their own marks. I don't know if it shows here or not; I don't think there is anything that shows.

Q. You think it was about eight, do you?

A. Well, I have told you it was after I was at the hospital. I don't know just what hour it was sent.

Q. And what relation, if any, to the deceased was the person to [67] whom it was sent?

A. A sister. That, however, I should qualify as the name that he gave me of his sister. I talked with

(Testimony of J. A. Curry.)

him about his sister before his death. I assume it is his sister.

Q. Well, did you have any talk at all with Mrs. Mason?

A. I have answered that question, also, by telling you that in so far as talking with a hysterical woman would be called a conversation.

Q. That is giving your opinion, but as to the fact as to whether you spoke to her and she spoke to you.

A. Naturally that occurred; yes.

Q. You did have a talk, then; you talked to her and she talked to you?

A. With the qualification, as I said.

Q. With or without a qualification, you did talk, did you? A. I said that we did.

Q. What was said?

A. About the only intelligent thing I got from her when I got to the hospital was that George was dead; and I found from some one of the nurses, I don't know which one—

Q. I am speaking about Mrs. Mason; what was said by her? A. I have told you.

Q. Have you told me all?

A. Yes, sir; I think all that I could swear to.

Q. You mean by that, all that you remember or what?

A. All that I remember of intelligent conversation, yes.

Q. How long were you at the hospital?

A. Possibly ten or fifteen minutes, maybe not to exceed eight; very short time.

(Testimony of J. A. Curry.)

Q. Did you leave her there, or go with her?

A. I think that Mrs. Mason rode away from the hospital in the same automobile that I was in.

Q. And where did you go to? [68]

A. I went back to the office; she went to the place where she stayed,—I don't remember, I think some place on the south side; I think Mrs. Barnhart was with her also.

Q. Was she in the car with you when you went by your office? Did you get off first? Did you get off first, or did she?

A. She got out at the place where she stopped and I rode in the front seat with the driver, and she and Mrs. Barnhart rode in the back seat.

Q. What, if anything was said to her by you regarding your intention to send this telegram?

A. I don't think I said anything to her about sending the telegram. I got some information concerning George's relatives of whom I knew, and I asked her at the time what the address was and she gave it to me. I knew the name.

Q. Now, did you get from third persons or from her the words to which I point in the second sentence in the telegram?

A. That, as I told you, was a street rumor down town.

Q. You say that was rumor,—these words to which I point?

Mr. JUDSON.—Object to that as having been already answered.

The COURT.—The objection will be sustained.

(Testimony of J. A. Curry.)

His answer to that is sufficient, it seems, to the Court.

Q. Well, about the third sentence in the telegram.

A. The third sentence?

(Counsel for plaintiff objects; objection overruled.)

A. The third sentence to which you point is an assumption from the second one.

Q. Is not that assumption, if assumption it be, then based on something that she had said?

A. I don't think so.

Q. Well, please read it again.

A. Well, I have read it twice. No, sir, I don't think so. I have told you two or three times that I wrote this at my office on my own initiative, and that, as I say, naturally follows out of the other; if the first was true the second is a natural consequence.

[69]

Q. Yes, I know all of that.

A. And the third one, you might go ahead, the final one is also.

Q. But what I want to get at is whether you wrote, for instance, the third sentence or the last sentence there? The fourth one has not been answered,—a mere assumption and without having talked about these matters with Mrs. Mason?

A. The fourth sentence, as you will recall, is a matter of inquiry, or substantially that, that Mrs. Mason—it wouldn't be necessary to ask Mrs. Mason for any information concerning that.

Q. What about the third sentence?

Mr. JUDSON.—I object to that as already answered.

(Testimony of J. A. Curry.)

The COURT.—Objection sustained.

Mr. SCALLON.—We save an exception to that, if your Honor please.

Q. What was it that you told Mrs. Mason of having sent this telegram?

A. In answer to that a while ago, I said that it was possibly the next day; I think likely it was.

Q. Did you tell her the contents of it at that time?

A. No, sir; because I didn't have any copy of the contents of it, and it was at the telegraph office.

Q. Regardless of your reason of your having a copy, did you purport to state to her the contents?

A. No, sir; I did not; I told her I had sent a telegram.

Q. To— A. Mrs. Benson.

Mr. SCALLON.—I will show this telegram to the Court, if your Honor please.

Q. Do I understand that you were acting in the capacity as a friend of the parties in sending this?

Mr. JUDSON.—I object to that as having been already answered and gone into. [70]

Mr. SCALLON.—This witness is, as we submit, decidedly an unwilling witness.

The COURT.—I don't know; it seems to me he has answered freely, but does not answer what you would like.

Mr. SCALLON.—Yes, he has answered freely, that's all. I submit the telegram to the Court.

The COURT.—I see nothing in it, except what he says, a subject of street rumor.

Q. Mr. Curry, you referred to a lady by the name

(Testimony of J. A. Curry.)

of Barnhart. A. Yes, sir.

Q. Do I understand you to say she was at the hospital when you went up there?

A. I didn't say she was at the hospital; I said she came away; I don't know whether she was there when I got there or not.

Q. But if she came away from there—

A. Yes, she came away from there in the same car that I did. She was there when I was there, but I understood you asked if she was there when I got there.

Q. No, whether you saw her there.

A. Yes, she was at the hospital there.

Q. In whose company was she? With whom was she?

A. When I saw her she was going out of the hospital with Mrs. Mason; she was around the hospital some place; I don't know where, when I first got there.

Q. Were they both coming out when you first saw Mrs. Barnhart?

A. When I first saw Mrs. Barnhart, yes.

Mr. SCALLON.—We will offer this exhibit I in evidence.

Mr. JUDSON.—Objected to as incompetent, irrelevant and immaterial and not connected with this.

The COURT.—Objection will be sustained.

Mr. SCALLON.—We save an exception.

(No cross-examination.) [71]

(Testimony of J. A. Curry.)

The said telegram was in words and figures as follows, to wit:

53 N. L.

Send NIGHT LETTER PAID and Charge to  
John A. Curry Personally.

May 6, 1919.

Mrs. Fred T. Benson,  
8 West Oak Street,  
Chicago, Illinois.

Otto died this afternoon of gunshot wounds self inflicted. The poor boy had been in fair health following return home until to-day when he suddenly grew despondent and committed the rash act. It is a terrible strain, but will strive to meet it bravely for Fern's sake. Wire me if you are coming.

MAE.

Charge this to John A. Curry. [72]

**Testimony of John C. Morrison, for Defendant.**

JOHN C. MORRISON, called and sworn as a witness for and on behalf of the defendant, in answer to the questions put to him testified as follows:

Direct Examination.

Mr. SCALLON.—Q. Mr. Morrison, what is your given, your full name? A. John C. Morrison.

Q. You live here in Great Falls? A. Yes, sir.

Q. What is your business?

A. Undertaking business.

Q. You may state whether or not you conducted the funeral of the late George Mason? A. Yes, sir.

Q. Do you know what became of the clothing he

(Testimony of John C. Morrison.)

had on him at the time he was taken from the hospital? A. I have them here with me.

Q. Have you got them all?

A. All except the underwear.

Q. Do you know what became of the underwear, of your own knowledge?

A. Well, as far as I can recollect, from what I know of our men who took—I am not sure whether he took the underwear off the body when it was taken to the preparation-room, or whether it remained with the body, but I think the underwear was there until the inquest, and I have always instructed them to take care of everything belonging to a body of a suicide until after the inquest was over, and I don't remember whether I told him it was necessary to keep it until after the inquest was over or not, and I never thought anything more about it, and, anyway, he put the clothes down in the vault room of our basement, and several weeks after that the agent of the New York Life Insurance Company—

Q. Have you found them now?

A. I found them except the underwear.

Q. Do you know what has become of the underwear?

A. I think it was destroyed; I am not sure. He could probably tell you about that. [73]

Q. Your man could? A. Yes, he is here now.

Q. Have you got the shirt? A. Yes.

Q. The outer shirt? A. Yes, sir.

Q. Will you please produce that? (The witness produces it.) That is the shirt, is it? A. Yes, sir.

(Testimony of John C. Morrison.)

Mr. SCALLON.—We offer this in evidence.

The COURT.—For what purpose?

Mr. SCALLON.—So that the jurors may see for themselves whether there is any perforation in it or not and where.

(The shirt was admitted in evidence.)

Q. What else have you got there?

A. Here is a piece of flannel that was taken off the body, and stockings and trousers. Of course, I couldn't swear to these being the clothes; these were the clothes given to me by our men; I didn't see the clothes taken off the body; I told him to get the clothes for me, and he could probably swear to the identity of them.

(No cross-examination.) [74]

### **Testimony of Henry D. Dunham, for Defendant.**

HENRY D. DUNHAM, called and sworn as a witness for and on behalf of the defendant, in answer to the questions put to him testified as follows:

#### Direct Examination.

Mr. SCALLON.—Q. State your full name.

A. Henry D. Dunham.

Q. You are employed where?

A. W. H. George Company.

Q. By this gentleman who was just on the stand?

A. W. H. George Company. His name is Mr. Morrison; he is the manager.

Q. Did you have anything to do with preparing the body of Mr. George Mason for funeral? A. I did.

Q. Who removed the clothing from his body?

(Testimony of Henry D. Dunham.)

A. When I went up to the hospital to get him, I can't swear to whether his clothing was on him yet or not, but anyway we took the clothing with him from the hospital, down from the place where they take the clothing off him at the hospital or not I can't just remember.

Q. Do you know what has become of the underclothes?     A. I do not.

Q. They are not around the establishment, as far as you know?

A. No, as far as I know they are not.

(No cross-examination.) [75]

**Testimony of Mrs. Catherine Clark, for Defendant.**

Mrs. CATHERINE CLARK, called and sworn as a witness for and on behalf of the defendant, in answer to the questions put to her testified as follows:

Direct Examination.

Mr. MADDOX.—Q. Mrs. Clark, what business were you engaged in in May, 1919?

A. I was bookkeeper for H. B. Lake & Company.

Q. Did you know George Mason personally?

A. I met him in a business way, several times in Mr. Lake's office.

Q. Do you remember any business transaction with him about noon or in the afternoon of May 6, 1919?

A. Was that the day Mr. Mason was killed?

Q. Yes.     A. I do.

Q. When did you see Mr. Mason on that day?

A. Mr. Mason came in the office some time either shortly before noon or shortly after one, I don't re-

(Testimony of Mrs. Catherine Clark.)

member which, and asked for his balance in the firm; he had a credit balance.

Q. Then did you give him his balance at that time?

A. Mr. Lake was not in at the time and therefore I couldn't—

Mr. JUDSON.—I object to that as not being responsive to the question. She can answer that yes or no.

Q. You didn't give him his balance at the time of his first visit? A. No.

The COURT.—Where was this now?

Mr. MADDOX.—In the office of H. B. Lake & Company.

Q. Later did you give him his balance?

A. Yes.

Q. He came in a second time, as I understand it?

A. Yes.

Q. Who signs checks for H. B. Lake & Company?

A. Mr. Lake signed it and I countersigned it at that time.

Q. I will have you look at Exhibit 3 and state whether that is the check which you gave him on that occasion. [76]

A. That is the check I gave him.

Q. Now, what was his appearance at that time, Mrs. Clark?

A. I don't remember anything about his appearance any other than at any other time.

Q. He wanted his balance though, I understand you? A. He asked for his balance.

(Testimony of Mrs. Catherine Clark.)

Q. And at that time was Mr. Lake himself in the office?     A. No.

Q. He didn't come in until afterwards?

A. Until after.

Q. Then Mr. Lake's signature on the check was placed on it some time after you had signed it?

A. Yes.

Q. Then he came back for it and you turned it over to him?     A. Yes.

Q. That was about one o'clock on the 6th day of May, 1919?

A. The second time he came back was about two, I think, between one and three.

Mr. MADDIX.—We offer this exhibit in evidence.

(Received in evidence over the objection of counsel for plaintiff.) [77]

**Testimony of Dr. Lee Roy McBurney, for Defendant.**

Dr. LEE ROY McBURNEY, called and sworn as a witness for and on behalf of the defendant, in answer to the questions put to him testified as follows:

Redirect Examination.

Mr. SCALLON.—Q. Please state your full name, Doctor.     A. Dr. L. R. McBurney.

Q. You live here in Great Falls?     A. Yes, sir.

Q. You are a practicing physician?     A. Yes, sir.

Q. You are also coroner of the county?

A. Yes, sir.

Q. And were in May of this year?     A. Yes, sir.

Q. State whether or not you held an inquest over the remains of Mr. George Mason.     A. I did.

(Testimony of Dr. Lee Roy McBurney.)

Q. In the month of May of this year?

A. I did so.

Q. As coroner state whether or not any pistol came into your possession in connection with the case.

A. It did.

Q. From whom did you get it?

A. I believe Dr. Durnin had it at the hospital and I notified him to bring it to the inquest, and it was at the inquest; I am not sure whether Dr. Durnin brought it or Sheriff Burns brought it.

Q. It was produced at the inquest? A. Yes, sir.

Q. Was Mrs. Mason present there when it was produced? A. Yes, sir.

Q. And what became of it afterwards?

A. I have it in my possession now.

Q. Have you always had it?

A. I had it except a short time ago I let Sheriff Burns have it.

Q. When was that?

A. A week ago Saturday, I believe; I don't remember just the date. When was it, Mr. Judson?

[78]

Mr. JUDSON.—I think that is correct.

Q. Did you have any interview with anybody representing the defendant about the gun at that time?

A. Did I have any what?

Q. Any interview with anybody representing the plaintiff at that time?

A. Well, only that Mr. Judson said that he would like to examine the gun and I let him examine it at the time. He said he would like to take it to the

(Testimony of Dr. Lee Roy McBurney.)

home of Mrs. Mason, and I told him that, as I had been subpoenaed, I wouldn't let him have it, but I would turn it over to Sheriff Burns, if he wished to accompany Mr. Judson to the home, and I turned it over to Sheriff Burns and got it from him this morning.

Q. You had been subpoenaed at the time?

A. Yes, sir.

Q. Have you got a record of the number of the gun?

A. There is a record in the proceedings of the inquest.

Q. Has the gun been used since it came into your possession first?     A. Yes, sir.

Q. For what purpose?

A. I had it with me several times on trips out in the country and I took occasion to shoot it at that time.

Q. Have you any knowledge of what, if anything, was done with it by Sheriff Burns?     A. No, sir.

Mr. JUDSON.—I object, incompetent, irrelevant and immaterial.

The COURT.—I cannot see that it serves any purpose. Do you want this gun introduced?

Mr. SCALLON.—I want to trace possession of the gun, inasmuch as it has not always been in possession of the proper officer we do not wish to introduce it ourselves, and I am explaining that.

(No cross examination.) [79]

**Testimony of George Harper, for Defendant.**

GEORGE HARPER, called and sworn as a witness for and on behalf of the defendant, in answer to the questions put to him testified as follows:

## Direct Examination.

Mr. SCALLON.—Q. State your full name, Mr. Harper.     A. George Harper.

Q. What is your position in this county?

A. Clerk of the District Court.

Q. Have you got with you the record of the inquest in the matter of George Mason, deceased?

A. I have.

Q. Will you please show them? (Produced and marked Exhibits 4 and 5.) I notice that an envelope fell out of it. Was that a part of it?

A. That is an exhibit. There's two of those exhibits, one is on the front page and one on the last page of the inquest.

Q. Is this the one you mean?

A. Yes, that is the other one; they are a part of the inquest as originally filed by the coroner. [80]

**Testimony of Peter Silk, for Defendant.**

PETER SILK, called and sworn as a witness for and on behalf of the defendant, in answer to the questions put to him testified as follows:

## Direct Examination.

Mr. SCALLON.—Q. State your full name, Mr. Silk.     A. Peter Silk.

Q. Your business?     A. Court reporter.

(Testimony of Peter Silk.)

Q. State whether you were present at the inquest over the remains of George Mason?     A. I was.

Q. Did you report the testimony?     A. Yes, sir.

Q. I show you here a paper attached to that report and marked, Exhibit 1, and I ask you, not to read it, but tell me whether that was produced at the inquest.

A. It was.

Q. You say it was produced?     A. Yes, sir.

Q. By whom?

A. Well, I don't recall now, Mr. Scallon, as to whether it was by the coroner or not.

Q. Can you refer to your report and tell us by whom it was produced?

A. I wouldn't be sure. It may have been introduced by Mr. Ewald, Deputy County Attorney, who was present that night at the hearing.

Q. It was produced by whom, you say?

A. I say it may have been produced by Mr. Ewald, Deputy County Attorney, present at the hearing that evening.

Q. Mr. Ewald was Assistant County Attorney?

A. Yes, sir.

Q. Will you look at your report and tell us whether or not any question was put to Mrs. Evelyn Mason, the plaintiff here, regarding this envelope?

A. Yes, sir.

Q. Now, I will ask you what was asked her about this envelope and what she said in reply. [S1]

A. First question pertaining to the envelope:

“Q. Where was the money?

(Testimony of Peter Silk.)

“A. It was in an envelope sitting on the bed—on the spring.

“Q. Was this the envelope the money was in?

“A. Yes, that is the one.

“Q. Was it all sealed up?

“A. No, the end was off; it was not sealed.”

Q. Now, will you look at page 38, what question was put to her there about this envelope?

A. “Q. This envelope, you say, was on the bed?

“A. It was sitting propped up.”

Q. What, if anything, did he say about who wrote the words on this envelope? Will you look on page 33, simply the sentence in which anything may have been said about the envelope, if any?

A. This is part of an answer:

“He said he had some money in his pocket and he took a pencil and wrote on an envelope on the floor and he says, ‘You have another dividend in the Anaconda coming.’”

Q. Now, on that same page, look down below, after the question and answer you have already read relating to the envelope, state what was said about money in it.

A. “Q. Was this the envelope the money was in?

Q. Yes, you have already read that; then you read down there to and including the answer, “No, the end was off; it was not sealed.” Following that what was said?

A. “Q. It was in bills, was it?

“A. Yes.

(Testimony of Peter Silk.)

“Q. \$25, he said?”

“A. No, \$745 in there and a \$25 dividend I think. The Anaconda has not paid the last dividend. I think that is the way.”

Mr. SCALLON.—We offer this envelope, Exhibit 3, in evidence—or rather Exhibit 1 of the coroner’s inquest.

(Marked Exhibit 6—Defendant.) [82]

Mr. JUDSON.—Objected to, irrelevant, incompetent, immaterial, illustrating no issue in this case, no proper foundation laid.

The COURT.—Objection overruled; it may be introduced. I don’t see why it is not detached.

Mr. SCALLON.—With your Honor’s permission I will take it off.

The COURT.—You can, without mutilating anything and it can be replaced later.

Mr. SCALLON.—Here is the envelope with words on it as follows: “May, there is still a dividend coming from Anaconda.” I would like to ask that the jurors inspect the envelope if your Honor please. (Handed to jurors.)

Mr. SCALLON.—I will read this check, if your Honor please, that was admitted in evidence: This check is of H. B. Lake & Co., 433-35 Ford Building. Great Falls Montana, May 6, 1919. 4061. Great Falls National Bank, Montana, pay to the order of George Mason \$713.19. H. B. Lake & Company. Underneath, H. B. Lake; in printing and writing. Endorsed George Mason.

(Testimony of Peter Silk.)

(By leave of Court the original check has been withdrawn and a copy substituted. It was stamped by perforation "paid 5-6-19.")

Cross-examination.

Mr. JUDSON.—Q. Mr. Silk, in this same conversation did Mrs. Mason make other statements there at that time?

A. I don't quite understand you.

Q. In this same conversation in which she stated these statements that you have related on the stand, did she make other statements there at that time?

A. Yes, I presume, there is the examination there in the record.

(Defendant rests.) [83]

PLAINTIFF'S CASE.

**Testimony of Charles G. Crago, for Plaintiff.**

CHARLES G. CRAGO, called and sworn as a witness for and on behalf of the plaintiff, in answer to the questions put to him testified, in substance, as follows:

Direct Examination.

Mr. JUDSON.—My name is Charles G. Crago. I am assistant foreman at the "Tribune." I have held that position for 15 or 20 years. I was acquainted with George Mason in his lifetime. I usually saw him twice every night.

Q. How did you come to see him twice every night?

A. Well, I eat at the Gerald Café and that is where he was manager.

Q. What have you to say as to whether or not he

(Testimony of Charles G. Crago.)

was, prior to the day of his death and on that day, of a cheerful or pleasant disposition?

A. He was very cheerful, especially toward the last, after he came back from California.

Q. What were his family relations?

A. I don't know; he always spoke well of his family and his child.

Q. Now, did you see him on the day of his death?

A. That morning; yes.

Q. You may state whether or not he seemed the same as usual, usual good spirits?

A. He seemed about the same.

(No cross-examination.) [84]

### **Testimony of Oscar L. Frederickson, for Plaintiff.**

OSCAR L. FREDERICKSON, called and sworn as a witness for and on behalf of the plaintiff, in answer to the questions put to him testified in substance as follows:

#### Direct Examination.

MR. JUDSON.—My name is Oscar L. Frederickson. I am a waiter at the Gerald. I was a waiter for them for seven years once and I left for two years and am back there three now. I was acquainted with George Mason in his lifetime. I worked most of the shifts with him. I worked on the shift with him the last few months and the last month prior to his death. He had a good disposition. On the day of his death and prior to that time he was very cheerful, always spoke well and always attended to his duty, always on the job all the time. His disposition was good;

(Testimony of Oscar L. Frederickson.)

good appearance always; cheerful. He was always steady. He was always in love with his family all the time. I often saw his wife and child at the restaurant. He went to meet them every time they came in. They were in quite regular right along, the lady and the girl. The last time I saw Mrs. Mason and the little girl in the restaurant was very close to his death. I can't say it was the night before or two or three nights before. Their relations at that time were very good. He earned good wages there. I think he owned his own home. He had a little girl about three or four years old.

Cross-examination.

Mr. SCALLON.—Q. Was he ill when he went to California?

Q. Had he been absent? A. He had.

Q. Sometime this year?

A. Up to the time he died?

Q. Yes, right before that time? A. Yes, sir.

Q. When had he been absent?

A. A short time up to his death.

Q. How long before?

A. I should judge it was—he had been working then about [85] 10 or 11 days, just came back from his trip from California.

Q. He came back from a trip to California?

A. Yes, sir.

Q. And went to work, as I understand?

A. Yes, sir.

Q. And had been working ten or twelve days?

A. I think it was close to ten or twelve days.

(Testimony of Oscar L. Frederickson.)

Q. Approximately, when he died? A. Yes.

Q. What was his condition when he left for California? A. He wasn't feeling very well.

Q. Do you know anything about his being sick after he came back?

A. He said he was getting better right along.

Q. What more did he say?

A. He said he was feeling better every night that I left him, he said he was feeling better.

Q. Is that all he said?

A. That is all I can say to my knowledge.

Q. Now, I ask you, however, if he had any sickness or any spell or attack of any kind after he returned from California? A. No.

Q. You haven't told me about that.

A. No, he did not.

Q. You were a witness before the coroner's jury?

A. I was.

Q. I will ask you whether you did not say this? "When he came back from his trip he said he was sleeping better and he said he was feeling better all the time; in another week he said he would be feeling all right." A. Yes.

Q. Did you testify that way? A. I believe I did.

Q. Was that correct? A. Yes, sir. [86]

Q. So he wasn't quite all right according to that?

A. Well, he said he was feeling better every night I left him, he said he was feeling better; he was in very good spirits when I left him that morning. I think it was close to ten or eleven or twelve days, something like that, that he worked at the restaurant

(Testimony of Oscar L. Frederickson.)

after his return from California. I think he put in a week anyhow. Oh, yes, I think he put in more than one day. I think he was off one or two days before he went to work upon his return.

Redirect Examination.

Mr. JUDSON.—Q. What was the matter with him at that time, if you know?

A. He ate something and I ate the same thing, and he got sick and I didn't; he broke down.

Q. He had ptomaine poisoning, something like that?

A. I can't say what was the matter with him; we both ate together and both ate the same thing.

Q. Did he about the time Mr. Scallon was asking about him say anything about buying some more property in town?

Mr. SCALLON.—Objected to as immaterial and irrelevant and also as self-serving.

The COURT.—No, I think not under the circumstances; he has asked for circumstances covering the same period. I think he may state any others that he knows that might bear an inference of expectation of continued life, if it bears such. For the jury; the objection will be overruled.

Mr. SCALLON.—Save an exception.

Q. What did he say, Mr. Frederickson, about that, if anything? A. In regards to what?

Q. In regards to buying any other property in town or selling anything he had.

A. He said he was going to sell his stocks he had

(Testimony of Oscar L. Frederickson.)

and was going to buy city property with his money from now on. [87]

Q. When did he make that statement to you?

A. After he come back from California.

Q. Would that be just a few days prior to his death?

A. Yes, very close; you see he was only back a short while.

Q. Did he say anything about building a new home?

A. He said he might sell the old home and build a home closer in on account of his wife didn't want to stay out there alone, it was too far out.

Q. That was just a few days before his death, did you say?     A. Yes, sir.

Q. Do you know anything about him purchasing a gun?     A. I do.

Q. Did you hear anyone ask him to purchase a gun?     A. I did. He has told me.

Mr. SCALLON.—Objected to as immaterial and irrelevant and also as incompetent, if your Honor please.

The COURT.—As the Court has said before, it may furnish a circumstance. If there is any room for inference that he bought the gun for suicidal purposes I think it would be permitted to show that he bought it for other purposes. The objection will be overruled.

Mr. SCALLON.—Save an exception.

A. Well, I heard Mrs. Mason say one time, "George, you will have to get me a gun if you want

(Testimony of Oscar L. Frederickson.)

me to stay out at that house.”

Q. When was that you heard her say this to him?

A. Close to the time of his death, after he came back from California.

Q. Where was she at the time?

A. In the Gerald Café.

Q. And who was with them, if anyone?

A. Baby and I and George.

Q. What was she doing in there at that time?

A. Eating. [88]

Q. That was a day or two before his death?

A. Yes, sir.

Q. Was there any reason for him, particular reason for him purchasing a gun stated at that time?

A. Well, he stated before to me that he would have to get a gun.

Q. Why? What was the reason, if any reason was stated?

A. Because his wife did not like to stay in the house alone unless she had a gun.

Q. Had there been anything happen at the house that would cause him, that you know of—?

A. Well, there was some people tried to break in the house at the time they was away to California.

Mr. SCALLON.—Move to strike that out as incompetent, irrelevant,—statement of the house.

The COURT.—Motion will be denied.

Mr. SCALLON.—Save an exception.

#### Recross-examination.

Mr. SCALLON.—Q. Mr. Frederickson, you referred, in answer to Mr. Judson, to a time when Mr.

(Testimony of Oscar L. Frederickson.)

Mason had eaten something which made him sick.

A. Yes, sir.

Q. Didn't he have stomach trouble?

A. Not up to the time we ate, at that time he did not; he was always in good health.

Q. I will ask you if you testified as follows before the coroner's jury:

“Q. Did he complain to you before he went on his trip about feeling bad?

“A. No, he said he was not feeling well.

“Q. Did he say anything as to what his trouble was?

“A. No, he said he couldn't hold nothing on his stomach.

“Q. He appeared to have stomach trouble, did he? [89]

“A. Well, at the time it was stomach trouble and weakness.

“Q. Where? Weakness of his body, you mean? A. No.

“Q. Weakness of his stomach?

“A. It seemed like he broke right down; he had been working awfully hard, I will say that; it seemed like he broke down. When he came back he said he was feeling fine and getting along better; he said in another week he would feel fine.”

Q. Did you so testify?

A. I testified very closely to that, if I remember right.

Q. Well, is that correct?

(Testimony of Oscar L. Frederickson.)

A. I think it is. I remember him saying he had stomach trouble, I know that myself, not stomach trouble, but from the bowels, that is where he was suffering from; I remember that distinctly.

Q. How long had that continued?

A. Well, he was sick from the time he laid off and went to California, and he come back and then he said he was feeling better right along.

Q. But previous to that he had been sick and it appeared to you as if he had broken right down?

A. He broke right down; yes, sir.

#### Redirect Examination.

Mr. JUDSON.—Q. I will ask you to state whether or not that was after this time he seemed to have eaten something that seemed to have poisoned him,—is that the time you mean he broke down?

A. Yes, that is the time he broke down. [90]

#### **Testimony of William Grills, for Plaintiff.**

WILLIAM GRILLS, called and sworn as a witness for and on behalf of the plaintiff, in answer to the questions put to him testified in substance as follows:

#### Direct Examination.

Mr. JUDSON.—My name is William Grills. I reside at 217 Central Avenue. I have resided in the city of Great Falls 28 years. I am in the restaurant business. I have been in that business since 1894 or 5. I call my place the Gerald Café. I have run that café about 20 years, I believe, 19 or 20. I was acquainted with George Mason in his lifetime. He

(Testimony of William Grills.)

worked for me. I can't just tell you exactly how many years he worked for me; the first time he worked perhaps a year, might have been two, but then he was away for a year or more, then he has worked for about 4 years since that time,  $3\frac{1}{2}$  years. Previous to the time of his death, he worked for me probably  $3\frac{1}{2}$  years. He was night manager for me. At the time of his death I paid him as salary fifty dollars a week. He was a very pleasant man, good to the customers. I saw him that morning about, probably, 6:30 or 7:00 when he went off shift. He appeared to feel good at that time. Why, I think he appeared cheerful and happy. I think he seemed to go out of the restaurant feeling as well as a person in health would. As far as I know his family relations were good. They had one child. Yes, I would say I think he seemed to have affection for his child and for his wife. I would say they got along as well as man and wife, and better than perhaps some. I never knew of them or saw them have trouble. He was a steady worker and a good man in his place. He held a responsible position with me. Yes, I was very well satisfied with him, sorry when I lost him.

Cross-examination.

Mr. MADDUX.—I stated that I paid him a salary of \$50.00 a week. This salary was usually paid Tuesday morning. I couldn't say except I look at the calendar whether May 6th, 1919, was Tuesday morning. On the morning [91] of that day I relieved him from his duty.

(Testimony of William Grills.)

Q. Yes, sir; and before he left the restaurant did he draw his pay check?

Mr. JUDSON.—I object to that as improper examination, irrelevant, incompetent and immaterial.

Mr. MADDOX.—You touched on the question of salary.

The COURT.—I think he may answer. Objection overruled.

Q. Do you recall, now, Mr. Grills, whether he drew his check that morning?

A. Yes, I think, in fact I am sure he had his check with him. Now, that was on Tuesday morning. He had worked for me the preceding day, Monday night. He commenced Monday night.

Q. Prior to that time when had he last before worked for you in the restaurant in his capacity as night manager?

A. Prior to what time, Mr. Maddox?

Q. Prior to Monday night, May 5th.

A. Well, he had got a week in and one night.

Q. He had a week and one night?

A. Yes, we pay every week over there.

Q. He had worked then the entire preceding week, had he? A. Yes, sir.

Q. And Monday of the next week? A. Yes, sir.

#### Redirect Examination.

Mr. JUDSON.—I want to ask just one question: Before he had this trouble or poisoning that has been mentioned on the stand here, do you know of him being ill? A. No, sir. [92]

**Testimony of Dr. W. H. Barth, for Plaintiff.**

Dr. W. H. BARTH, called and sworn as a witness for and on behalf of the plaintiff, in answer to the questions put to him testified in substance as follows:

**Direct Examination.**

Mr. JUDSON.—My name is Wm. H. Barth. I reside in Great Falls. My occupation is dentistry. I have been a dentist since 1899. I have practiced in the city of Great Falls about 19 years. Besides dentistry, I hold an official position for the United States, that of Supervisor of Census for the Second District of Montana. I knew George Mason in his lifetime. I expect I knew him since the time he first came here. Quite frequently I ate at the Gerald Café. He always seemed jovial and very pleasant with me and all customers there, never seemed to have any trouble. I think I saw him the night before his death. At that time he seemed to be in very good spirits; he shook hands with me and said he had returned from a vacation. I am also acquainted with Mrs. Mason. So far as I knew their family relations were pleasant. I took Thanksgiving dinner with them, I think, a year ago. They seemed to be very happy.

Q. What kind of a home did he have, Doctor, as to whether it was a well-appointed home?

Mr. SCALLON.—Objected to as immaterial, irrelevant.

The COURT.—He may answer; objection overruled.

(Testimony of Dr. W. H. Barth.)

Mr. SCALLON.—Save an exception.

A. He had a very pleasant home, everything seemed to be very comfortable.

Q. How was it furnished, Doctor?

A. Furnished very well.

(No cross-examination.) [93]

### **Testimony of Nick J. Haynes, for Plaintiff.**

NICK J. HAYNES, called and sworn as a witness for and on behalf of the plaintiff, in answer to the questions put to him testified in substance as follows:

#### Direct Examination.

Mr. JUDSON.—My name is Nick J. Haynes. My occupation is a cook. I have been a cook about 10 or 11 years. I work at the Gerald Café. I have worked there between ten and eleven years. I worked from four in the afternoon till twelve at night. I was on the shift that the deceased Geo. Mason worked. I have known George Mason about 8 or 10 years. He had a very good disposition. He always seemed very happy. I saw him the night before his death. At that time he appeared very happy. He seemed just the same all the time. As to the relations between himself and his wife as to whether or not they were pleasant and whether or not they showed affection for each other, they were always pleasant when I saw them. He thought the world of his little girl.

(No cross-examination.) [94]

**Testimony of Gertrude Clark, for Plaintiff.**

GERTRUDE CLARK, called and sworn as a witness for and on behalf of the plaintiff, in answer to the questions put to her testified in substance as follows:

Direct Examination.

Mr. JUDSON.—My name is Gertrude Clark. I reside at my home residence in the city of Great Falls. I have resided there two years. I am cashier at the Gerald Café. I have been cashier at the Gerald Café for two years. I work from five in the afternoon until 1:00 in the morning. I was acquainted with Geo. Mason in his lifetime.

Q. What was his disposition as to whether he always appeared jovial and pleasant?

Mr. SCALLON.—I would like to enter an objection by way of suggestion to counsel that he avoid such leading questions.

Mr. JUDSON.—I don't intend—I was hurrying, I didn't expect to.

Q. You may state what his—I don't know—

The COURT.—Change it and say “In reference to joviality, cheerfulness, pleasantness.”

A. Mr. Mason always seemed very pleasant, very good to the customers, always jovial.

I saw him the night before his death, when he went off duty. He seemed in the usual way, very happy. Yes, he appeared to show affection for his wife and child, they seemed very well, always appreciated them coming in, always treated them very well.

(No cross-examination.) [95]

**Testimony of John C. David, for Plaintiff.**

JOHN C. DAVID, called and sworn as a witness for and on behalf of the plaintiff, in answer to the questions put to him testified in substance as follows:

**Direct Examination.**

Mr. JUDSON.—My name is John C. David. I clerk in the Northern Hardware Company. No, sir, I did not know Geo. Mason. I know to whom you refer as Geo. Mason. I have seen him on the street. I did not see him any place else than on the street that I can remember of. I only saw him in the Northern Hardware Company the day that he came there. At the time I saw him there he asked to be shown a revolver. I showed him one. I showed him a 32-Colt's automatic.

Q. I will show you this gun and ask you to look at that gun and tell me is that gun similar to the one—

A. Yes, that is the same type of a gun; yes, sir.

Q. Did you show Mr. Mason how to operate that gun? A. Yes, sir.

Q. Did he tell you any reason why he was purchasing that gun?

Mr. SCALLON.—We make the same objection to this evidence, if your Honor please.

The COURT.—When was this?

Q. What day was this?

A. I don't remember the date.

The COURT.—About? Was it about near the day of his death?

A. The day of his death; yes.

(Testimony of John C. David.)

The COURT.—I think this would likely come within the rule of self-serving statements; unquestionably if a man was buying a gun intending to use it upon himself he never would say so. I think we will exclude that; objection sustained.

Mr. JUDSON.—Very well.

Q. Did he know how to operate this gun?

A. No.

Q. Did you show him how?

A. I showed him all I knew about it. [96]

Q. Have you handled guns to amount to anything?

A. Not in the automatics; no, sir.

Q. You may state whether or not he appeared to be wholly ignorant as to the operation of the gun which you showed him.

Mr. SCALLON.—Objected to as incompetent, if your Honor please.

The COURT.—I think he may answer that.

Mr. SCALLON.—Note an exception.

A. I should say so; yes.

#### Cross-examination

Mr. SCALLON.—Q. You say you showed him how to operate it? A. I did; yes.

Q. Let's see, what instructions did you give him about it?

A. Nothing except the loading of it, the filling the magazine and cocking the hammer, which consists in pulling back this slide.

Q. Go through the motions.

A. That cocks the hammer and there is the cartridge in the chamber which makes it all ready to

(Testimony of John C. David.)

shoot unless the safety is one. This is the safety here, and when that is pulled down this way and the finger and your thumb is pressed together the gun explodes. (Witness went through the motions.)

Q. Yes, and you showed him the way you indicated to me, did you? A. Yes, sir.

Q. To do like this? (Indicating.)

A. Yes, that is the way it has to be loaded.

Q. And that is the way you showed him?

A. Yes.

The COURT.—Did you say you sold him one?

A. I sold him the gun; yes, sir.

Q. I don't remember whether the witness stated the caliber.

A. 32-caliber. It was a Colt's automatic make. We have a record of the number over there. [97] We have to have a permit. I think I have the number with me. (Refers to memorandum.) Number 248103. I was a witness at the coroner's inquest. I don't remember of ever giving the number there. I wasn't asked, if I remember right.

Q. Well, I will read you a question here and an answer from the report of the inquest, in your examination:

“Q. Do you recognize this gun?”

“A. Yes; of course I can't tell except by the number, the serial number, but that is the same kind of gun, 32-caliber.”

“Q. That is the gun, 248743, is it?”

“A. I have it on record; I don't remember the gun.”

(Testimony of John C. David.)

A blank was filled in by another clerk over there; when Mr. Mason came back after getting a permit another clerk wrapped up the gun with a box of shells for him. I was waiting on another customer at the time. That is the number that is on record, the one I have in my pocket. [98]

**Testimony of Mrs. Evelyn Mason, in Her Own  
Behalf.**

Mrs. EVELYN MASON, the plaintiff, called and sworn as a witness in her own behalf, in answer to the questions put to her testifies as follows:

Direct Examination.

Mr. JUDSON.—Q. You may state your name.

A. Evelyn Mason.

Q. Are you the widow of Geo. Mason, deceased?

A. I am.

Q. And the beneficiary under the policy sued on in this action? A. Yes.

Q. Did you demand of the defendant the payment of this sum of money due under the policy?

A. I did.

Q. Has it ever been paid?

Mr. SCALLON.—No question about that, your Honor.

A. No.

Q. No part of it? A. No.

Q. Mrs. Mason, where do you reside? Where is your home? A. 2200 First Avenue North.

Q. And where did you reside at the time of the death of Mr. Mason?

(Testimony of Mrs. Evelyn Mason.)

A. At 2200 First Avenue North.

Q. Who owns the house at 2200 or who owned it?

A. It is our home.

Q. And what size of a house is that?

A. It is a small bungalow.

Q. How many rooms?      A. Five and a bath.

Q. Is there a basement in that house?

A. Yes; half basement.

Q. Full basement or—      A. No, half basement.

Q. And was that home paid for?

A. Yes; it was paid for.

Q. It belonged to you and Mr. Mason?

A. Yes.

Q. What were your relations, yours and Mr. Mason's, as to whether they were pleasant or otherwise, Mrs. Mason? [99]

A. Always very pleasant.

Q. And did you and Mr. Mason have any children?

A. Baby girl, four years old.

Q. And what was Mr. Mason's disposition as to whether or not he was of a pleasant disposition or morbid?

A. No; George was unusually happy.

Q. And the day of his death how was he, how did he appear?

A. Why, he was very pleasant.

Q. What time, Mrs. Mason, did Mr. Mason come home that day, if you remember?

A. At six o'clock in the morning.

Q. Of the sixth of June?      A. 6th of May.

Q. 6th of May, 1919. And how did he appear to

(Testimony of Mrs. Evelyn Mason.)

be at that time? Did you notice anything unusual about him? A. No, he was in a good humor.

Q. And what did he do? Did he go down town during that day?

A. No, not that morning; he went to bed.

Q. Then you may state when he got up.

A. Why, I woke him up about 11 o'clock and he got up then and he played with the baby. She went in the room and woke him up and I was getting breakfast. I didn't sleep well that night; I didn't wake up early, and I was going downtown, and he says, "I believe I will go down, too, and get the gun and some shirts and get the money," that he had coming.

Q. Now, the gun,—what did you mean by "he would get the gun"?

A. I had asked him to get the gun—

Mr. SCALLON.—One moment, please. We object to oral communications between these parties, on the ground the witness is incompetent to testify to the same, first, because she was the wife of the deceased and, second, because she is a party to the suit and, regardless of marital relations, the communications would be between a party to a suit and a deceased person, and therefore, doubly incompetent. We refer to, and your Honor of course is familiar with, the provision of the law relating to married people, and in addition to that, if your Honor please, in [100] the Act passed in February, 1913, there occurs a fourth subdivision, together with the introductory sentence, reads as follows:

“The following persons cannot be witnesses: Parties or Assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against any person or corporation, as to the facts of direct transactions or oral communication between the proposed witness and the deceased, or the deceased agent, of such person or corporation, and between such proposed witness and any deceased officer of such corporation.” The statute, as your Honor will see, introduces a disqualification that had not formerly obtained under the Montana statute, by introducing that subdivision four. It happens, if your Honor please, that the statute is not correctly printed in the official edition of 1913. In supplement published by Bancroft-Whitney it is substantially complete, but not absolutely so; there is an absence of a comma and the absence of the article “the.” I have here a certified copy of the law.

The COURT.—Has this law been construed by the courts?

Mr. SCALLON.—Not that I know of.

(After a recess.)

The COURT.—I am of the opinion that this new enactment of 1913 has no application to a case such as that now before the Court. There are two or three words in it that render it somewhat ambiguous and somewhat confusing, but I am of the opinion that it relates to a case wherein the defendant person is deceased, or the agent of the defendant is deceased, or the agent of a corporation or the officer of a corporation is deceased, where the witness about to testify

purports to testify to evidence happening with that deceased person. This is not such a case to which the law is designed to apply. The defendant, no agent or officer, is involved; simply a statement of a witness and party's deceased husband to her. Now, as to the provision of the law that no husband nor wife, without the consent of the other, can be examined as to any communication made by one to the other during marriage, of course that law is designed for a good purpose, supposed to be better for the peace and happiness of the family and for communities in general that husband and wife be not permitted to testify as to what happened between them, either against [101] the other, or in any other proceeding, unless both are willing. Where one is dead, of course the consent of that person cannot be procured and ordinarily the testimony of the other to what took place between them during the marriage relation, received during the married relation, would be excluded, but in this case the defendant has already introduced some testimony as to what this witness said had taken place between her and her husband in her lifetime, and I am of the opinion that, so far as the defendant will be in position to invoke that rule of law, that they have waived it and can waive it; parties can waive it; they waived it by appealing to those very confidential communications which it is the policy to bar. For instance, they have had witness Silk testify as to what this witness testified to at the coroner's inquest in reference as to what her husband had said to her, and produced an envelope

(Testimony of Mrs. Evelyn Mason.)

written by him to her which she had secured. Therefore, for these reasons, the objection, which I believe otherwise would be good, will be overruled.

Mr. SCALLON.—Note an exception.

Q. Please read the last question.

Mr. SCALLON.—To avoid entering any further objections of record, it may be understood this goes to the whole of this.

The COURT.—I think so, yes, so far as it touches communications between the witness and deceased husband, private communication.

Q. You may answer that now, Mrs. Mason?

A. I had asked him to get the gun because someone had broken in the back door before and someone was around the house that night, and a few days before he promised to get it and he never got it, and that evening I was downtown, baby and I, and I went into the Gerald Café and I went in the back box and Mr. Frederickson waited on us and George came in and I asked him if he had seen about getting the gun, and he said, “No, but I will to-night as soon as Mr. Burns comes in.”

Q. Who is Mr. Burns?      A. He is the sheriff.

Q. And why did he want to see Mr. Burns, the sheriff?

A. Why, he was going to get a permit to get the gun, but he thought [102] he could get it without getting the permit.

Q. Now, then, he left the house, did he?

A. Why, he talked awhile and then I was dressing and he went before I did, on the car.

(Testimony of Mrs. Evelyn Mason.)

Q. Where did he go,—downtown?

A. He went downtown.

Q. And in what spirits was he when he left the house?

A. Why, he seemed happy; he come back and kissed me and he had been playing with the baby and rolling on the floor with an orange.

Q. What did you do after that when he left for downtown?

A. I finished dressing and then baby and I went downtown.

Q. And when did you return home?

A. I think it was near 4:00 o'clock.

Q. And this was on the 6th day of May, 1919?

A. Yes.

Q. When you returned home what did you discover, if anything?

A. Well, I left the door so he could get in, and I seen he fed the dog, and I went in and I saw he brought a package in, and baby ran in the room and I called her and told her not to wake up daddy and she said "He isn't there," and I heard him calling from the basement.

Q. What did he say?

A. He said, "Mae, Mae!"

Q. What did you do then?

A. I ran down in the basement.

Q. What did you discover?

A. He was lying on the bed.

Q. What bed? What do you refer to?

(Testimony of Mrs. Evelyn Mason.)

A. The bed in the basement; we had a bed in the basement.

Q. Why did you have a bed in the basement?

A. When it was very hot last summer he always slept in the basement, and I had taken the mattress off and I hadn't put it on yet this year.

Q. That is, he had worked nights, had he, for years?

A. Yes, since we have been back, three years and over.

Q. What did you then do when you got down to the basement?

A. He said, "I bought that gun and it shot me twice." [103]

Q. And did you see a gun there?

A. The gun was lying by the bed.

Q. And what did you do then, if anything?

A. I don't know. I was so excited,—I started to pick the gun up and he grabbed hold of my hand and told me not to touch it, it would shoot me, it shot repeatedly, and he didn't want me to touch it.

Q. Then what did you do?

A. I helped him upstairs and called the doctor, phoned down to Miss Edith and she sent the doctor up.

Q. Who is Miss Edith?

A. The cashier of the Gerald Café.

Q. And while you were in the basement did he say anything else to you or—did he say anything to you about the shooting while you were in the basement?

(Testimony of Mrs. Evelyn Mason.)

A. I asked him how it happened and he said, "I didn't mean to."

Q. And how did he get upstairs then?

A. I helped him upstairs.

Q. And where did you go with him when you went upstairs?

A. Into the bedroom and he lay on the bed.

Q. And I believe that is where he was when the doctor came?

A. Yes; he was in the bedroom where we slept.

Q. When he was downtown that day did he make any other purchases that you know of?

A. Yes; he bought some elastic rubber and tape to fix his aprons.

Q. Where did you find that?

A. It was lying on the table; and a box of cartridges was on the table too.

Q. There was some talk about an envelope that was there; what was said about that envelope when you saw him?

A. When I went down the envelope was sitting on the bed, at the head of the bed. The post goes up; and he told me to take the money and stick it in my dress. I says, "Why do you think of money now?" He says, "If I have to stay in the hospital you will need that money."

Q. Did he say when he wrote that note? [104]

A. Why, he said he tried to get up and he couldn't, and he thought he was dying, so he didn't want to have the money in his pocket and afraid I wouldn't get it, so he took an envelope off the floor, and a

(Testimony of Mrs. Evelyn Mason.)

trunk at the head of the bed, and he wrote it with a short pencil he had in his pocket to write orders with; the pencil was on the floor.

Q. You may state where this envelope came from, if you know.

A. Why, it either come out of the waste-basket or old envelopes I had in the trunk, my boy had when he was at home, to write, some cheap ones, and Fern had it playing down there; I don't know if he got it out of the waste-basket or out of the trunk.

Q. When he left for downtown had he shaved yet that day?     A. No, he didn't shave yet.

Q. How was he after you found him downstairs there?

A. Why, he shaved after he came home.

Q. You may state if there was any evidence of his having shaved after he came up?

A. When I came upstairs I got blood on my hands and went to get a towel and wipe his hands and my hands and when he shaved he wiped his razor on tissue paper, and it was hanging on a little glass we have over the wash-basin and rock he sharps his razor with was on paper and I knocked it off too, and the soap was on too.

Q. You mean the fresh lather?

A. Yes, where he went to shave.

Q. When he went to shave how did he arrange his clothing?

A. He always unbuttoned them and rolled them back, because he sponged his chest with cold water. He shaved every day.

(Testimony of Mrs. Evelyn Mason.)

Q. You may state how at times he went about the house during warm weather.

A. I don't know why, he never buttoned his clothes up all the way in front.

Q. What do you mean, his clothes?

A. His underwear; and that day this undershirt was awfully tight and he told me to leave his B. V. D.'s out, and I hadn't got them out yet. [105]

Q. Will you please show the jurors, if you can, by your own waist-coat there, or coat, how his shirt was rolled back.

A. He always rolled it back like that on each side, and then he sponged his chest with cold water and under his arms.

Q. You may state, if you know, whether or not he had—did you have any other gun there?

A. We had an old gun that we had had for a long time, but it was broken.

Q. Did he ever shoot that gun at any place in the house?

A. Why, he shot it a few times down in the basement, but when the armistice was signed we gave it to the baby to play with and it got rusty and the cylinder wouldn't roll around, and he said it was no use to get any cartridges for it because it wouldn't shoot any more.

Q. You may state whether or not just prior to his death there was any evidence of someone trying to get into your house shortly prior, other than the one you mentioned at the door?

A. That night before someone tried, pried the

(Testimony of Mrs. Evelyn Mason.)

screen partly off the window, the side window where the fireplace is, and I told him when he came home.

Q. What evidence was there there that that had been done?

A. When I told him he said it was the coal crack-  
ing in the basement; then he went out and looked  
and there was a piece of steel about that long (in-  
dicating) under the window, and he brought that in,  
and he was angry and said, "I am going to get that  
gun and if someone tries to get in the house, to shoot  
them."

Q. Do you know whether or not your husband had  
been informed about some particular persons that  
had tried to get into his house?

A. Yes, sir; someone had told him some men here  
in town were the ones.

Q. What, if anything, had you and Mr. Mason  
planned to do in the spring of 1919, just prior to his  
death or about that time?

A. Why, we were going to sell this home and take  
the money we had and a few liberty bonds and try  
to buy a larger place closer in, where we could [106]  
have a couple of roomers and I wouldn't be afraid  
to stay alone.

Q. And for that purpose did he attempt to get any  
money any place?

A. That is the reason he sold this stock we had.

Q. Where did you have this stock?

A. A few shares of Alaska Gold in Lake's office.

Q. H. B. Lake Company's?

A. Anaconda Company, the shares was.

(Testimony of Mrs. Evelyn Mason.)

Q. Your husband, was he financially embarrassed?

A. No; we had money; we had a few liberty bonds.

Q. Did he owe any money?

A. No; we probably owed \$30 altogether in town.

Q. Now, you may state whether or not your husband went to California shortly prior—some time during last spring during 1919?

A. Why, he had not heard from his sister for several years and he just had located her and he eat some cheese and had a touch of ptomaine poison, so he said he thought it would be a good time to lay off and go to see his people, so we took the trip to California.

Q. Did you go with him and the little girl?

A. Yes; the baby and I went.

Q. And you may state whether or not until he had this illness, what you term as a touch of ptomaine poisoning, he was ever ill before.

A. No, George was never sick; he was a Christian Scientist and he never taken any medicine; he didn't while he was sick this time; he said he cured himself in three days.

Q. Did you hear the statements of Dr. Durnin this morning that he mentioned when he said that you were riding to the hospital with him. ,

A. Yes, I did.

Q. Did you make such statements at that time?

A. I never spoke to Dr. Durnin from the time I left my home until the time he told me that George was dead.

(Testimony of Mrs. Evelyn Mason.)

Q. Have you had a little trouble with Mr. Durnin?  
[107]

A. No; Dr. Durnin charged me \$200 for my bill.

Q. Did you have a dispute with him about that?

A. No; I tried to get him to cut the bill down and he wouldn't.

Q. You haven't settled with him yet, Mrs. Mason?

A. No; I sold my furniture and I paid him \$100, and he holds the other on my house.

Q. Mrs. Mason, what do you say that he said about the gun when you went downstairs? I am not sure whether the jury heard that or not.

A. He told me, "I bought that gun and it shot me twice," and he told me not to touch it that it shot repeatedly, that it might shoot me.

Q. What else, if anything, did he say about it?

A. He told me he didn't mean to shoot himself—"Why would an accident happen like this?"

Q. Did he say anything about whether or not he was shot seriously?

A. No, he told me he didn't think he was, when we were in the basement.

Q. You may state whether or not he said anything to you about—

A. He told me not to worry, everything would be all right.

Cross-examination.

Mr. SCALLON.—Q. Mrs. Mason, where did Mr. Mason carry that little pencil that you spoke about?

A. In the little pocket in his trousers, where you put your watch.

(Testimony of Mrs. Evelyn Mason.)

Q. And what do you say about his hands when you found him, after the shooting?

A. He had blood on one of his hands; when he got hold of me I got it on me,—I put my arm around him when you carried him upstairs.

Q. Which way was he lying in relation to the bed?

A. He was lying with his head this way,—this was the foot of the bed, and head was in the corner, and he was lying this way; the truck was right by the bed, and he was lying with his head toward the trunk and his feet right across the bed. [108]

Q. With his head toward the trunk?     A. Yes.

Q. Lying on his back?     A. Yes, on his back.

Q. And on the right side of the bed, was it?

A. The bed is this way, and he was lying here; no, left side.

Q. The bed was up against the wall or partition?

A. Yes, the wall in the corner.

Q. In the corner?     A. Yes.

Q. In which corner?

A. In the left-hand corner of the house, left side.

Q. Left side as you go down into it?

A. No, the right side as you go down in the basement, as you go down the steps.

Q. You go down the steps?

A. You go down the steps and then turn by the furnace; the furnace is in the middle of the basement, and the bed is there, and the foot is toward that way, and head is towards the furnace.

Q. The head of the bed was toward the furnace, you mean?     A. Yes.

(Testimony of Mrs. Evelyn Mason.)

Q. Where was the trunk,—up against the wall or close to the furnace?

A. The trunk,—there is a partition thru half the basement—the trunk is against that partition, against where the foot part of the bed is; he was lying with his head toward the foot part of the bed.

Q. Toward the foot part of the bed? A. Yes.

Q. And was the bed in the front part of the basement or the rear part? A. In the rear.

Q. In the rear? A. Yes.

Q. On what side of the street is the house?

A. The house is on the right-hand side as you—

Q. —as you go out?

A. Yes, as I go up on First Avenue North.

Q. First Avenue North?

A. Yes, it is right on the corner of 22d.

Q. That is an avenue parallel to Central Avenue here, is it? A. Yes. [109]

Q. Runs in the same direction? A. Yes.

Q. Out the way I am pointing now in relation to the courthouse? A. Yes.

Q. And you are on the right-hand side of the street, the house? A. Yes.

Q. And the staircase goes down toward the front of the building, does it?

A. In the rear, the stair, it goes down from the kitchen.

Q. But as you go down the staircase, you are going toward the front of the building?

A. Going toward the side, toward the street; the stairway opens toward the side.

(Testimony of Mrs. Evelyn Mason.)

Q. Toward one side of the building?      A. Yes.

Q. It goes down along the side?      A. Yes.

Q. But as you go downstairs you are facing toward the street?

A. Yes, toward the street, not the avenue.

Q. Eh?

A. Not the avenue,—the street; the stairway faces the street, not the avenue. This is First Avenue North and this is 22d Street.

Q. You were on the corner?      A. Yes.

Q. Well, now, at which end of the cellar or basement is the staircase?

A. It is the rear end on the right-hand side coming this way, I think, I don't know.

Q. Well, the bed was up against the partition, as I understand you?

A. The middle partition, yes, in the corner.

Q. And he was lying with his head toward the foot of the bedstead?      A. Yes.

Q. And that is where the trunk was, up against the partition?      A. Yes, sir.

Q. So that his head was away from the furnace?

A. Yes, it was away from the furnace.

Q. And he was lying on his back?      A. Yes.

Q. And when he took hold of you, he took hold of you with the hand nearest to you, didn't he? [110]

A. No, I think he reached over with his other hand.

Q. You think he reached over?      A. Yes.

Q. He turned over, did he, sit up first?

A. No, he kind of raised his arm and he reached over.

(Testimony of Mrs. Evelyn Mason.)

Q. Reached over? A. Yes.

Q. Now, how much blood was there on his hands?

A. At that time there was only a little bit; when he got up he tried to close his shirt and he got more.

Q. It was upstairs that you wiped the blood off his hands, was it, or downstairs?

A. I wiped it off my arm and a little bit off my finger upstairs, after I laid him on the bed, after I had called the doctor and Mrs. Burnhart.

Q. You got blood on your arm, you say?

A. Yes, I got blood on my arm.

Q. Do you remember which arm it was?

A. It was on this one.

Q. The left arm? A. Yes.

Q. Is the staircase enclosed? A. No, it isn't.

Q. Or just— A. Just plain stairway.

Q. Is there any railing to it?

A. No, there is no railing.

Q. No railing. In going up against the stairs was he up against the wall or away from the wall?

A. No, he was away from the wall; I was up against the wall; he had his right arm over my shoulder and I put my other hand around his waist.

Q. And you took him into the room? A. Yes.

Q. Or walked with him into the room; he walked up himself, didn't he? A. No, I helped him up.

Q. You helped him, but he walked, you didn't carry him? A. No, I couldn't carry him.

Q. And both of you walked into the room?

A. Yes. [111]

Q. And laid down on the bed? A. Yes.

(Testimony of Mrs. Evelyn Mason.)

Q. The bed which you two were occupying?

A. Yes.

Q. What became of the gun?

A. Dr. Durnin taken the gun.

Q. Now, I show you a diagram here and ask you whether that correctly represents, approximately of course, the basement, the staircase, and the position of the furnace and the bed.

A. No, that bed was up close in the corner, right up against the wall; the trunk is there all right, but put the bed right up between the trunk and wall and the trunk is right by the head of the bed.

Q. Otherwise is it correct?

A. Yes; the coal-bin is much larger than that.

Q. Yes, but that is the place where it is?

A. Yes, this is similar, something similar, but it is bigger than that. The basement is about half dirt and half the other.

Q. In other words, there is not as much excavated as there is shown here? A. No.

Q. Compared with the whole size? A. Yes.

Q. You would make this apartment larger there?

A. Yes, it is larger.

Q. It is about as large as the other part or smaller?

A. Just a little bit smaller.

Q. Well, suppose we rub out the old line and mark it about like this? A. Yes, that would be—

Q. —about the size of it? A. Yes.

Q. Now, as to the bed, we will bring this up this way, that would make the bed a little too long possibly, but that would show the position of the bed?

(Testimony of Mrs. Evelyn Mason.)

A. Yes.

Q. Yes.

A. Pushed between that partition and that.

Q. And the trunk, yes; the trunk was between that and the bed. And then Mr. Mason was with his head where the trunk was? A. Yes.

Q. Now, I have rubbed out the old line here that was supposed to mark the end of the basement or one side of it, and I have put this other line as [112] I showed you a while ago, and there were the words "First Avenue" here and I write them at the top of the sheet of paper; I didn't get it off very clean, but it was intended to show that line. That would show approximately now, as I understand you, the size of this portion of the basement? A. Yes.

Q. And the correct relation of the street?

A. Yes.

Mr. SCALLON.—I offer this in evidence. Admitted.

(Marked Exhibit No. 7, Defendant.)

Q. Where do you reside now?

A. At the Foley Hotel.

Q. At the Foley Hotel? A. Yes.

Q. Since when have you lived there?

A. Well, I have lived there three or four months, about three months I believe now since I rented my place.

Q. You rented your place? A. Yes.

Q. And what became of your daughter or little girl? A. I have my little girl with me.

Q. Did you have her all the time?

(Testimony of Mrs. Evelyn Mason.)

A. No, she is going to school part of the day at the Academy.

Q. Did she live with the folks who rented your house?

A. She stays with them sometimes and sometimes she stays with me; I stay up there quite often, too.

Q. Well, was she staying there regularly at any time?

A. Well, she goes to school in the morning and I go up every evening up there.

Q. Well, she was living with them, not staying with you at the hotel?

A. She stays with me part of the time; I get her on Saturday night and Sundays; I take her home so she can go to school Monday morning.

Q. During the week she stays where?

A. She stays with them, and I go up there in the evening.

The COURT.—I can't see that this is relevant, is it?

Mr. SCALLON.—In a way.

A. I couldn't keep up the house.

Q. How long have you lived in Great Falls? [113]

A. I have lived in Great Falls about seven years.

Q. Seven years?

A. Yes, except the fourteen months I was away.

Q. And you got married to Mr. Mason in 1914, did you? A. 1914.

Q. When did you go to live at 2200 First Avenue North?

(Testimony of Mrs. Evelyn Mason.)

A. Three days after we returned from Alaska we bought that little place.

Q. After getting married you went to Alaska, did you? A. Yes, we went to Alaska.

Q. How soon after?

A. We went the next day; we went to Canada and then went from Canada to Alaska.

Q. Where were you living prior to your marriage?

A. I stopped at the Harrington Hotel and then I stopped with Mrs. Barnhart a while; I did some sewing for Mrs. Barnhart and I sewed for other people.

Q. Pardon me; I didn't hear you.

A. I did some sewing, I said, for Mrs. Barnhart and sewed for other people before.

Q. How long had you been sewing before you were married?

Mr. JUDSON.—Objected to—incompetent, immaterial.

The COURT.—Sustained.

Q. You say you lived with Mrs. Barnhart?

A. Yes.

Q. At that time?

A. Yes, when I married I was living with her.

Q. Where was she living at that time?

Mr. JUDSON.—Objected to, incompetent, irrelevant and immaterial.

The COURT.—Sustained.

Mr. SCALLON.—Save an exception.

Q. You have been living in Great Falls, if I understand you? A. Yes. [114]

(Testimony of Mrs. Evelyn Mason.)

Q. Two years before you were married?

A. No, not two years.

Q. How long?

A. A few months; I don't know just how long.

Q. Where was Mrs. Barnhart living when you lived with her?

A. Eighth Avenue South; I don't know the number; I think it is 400 and something. She will know.

Q. Did you see Mr. Curry on the night of the shooting?

Mr. JUDSON.—I object to that as improper cross-examination.

The COURT.—Sustained.

Q. Did you tell anyone on the day of the accident that Mr. Mason had told you that he did not mean to?

Mr. JUDSON.—I object to that as improper cross-examination.

The COURT.—She may answer; overruled.

A. Did I tell anyone?

A. Yes.

A. Why, I suppose I did.

Q. Well, I am asking you for sure, not what you suppose.

A. Yes, I believe I did; yes, I know I did, because Mrs. Barnhart was there and I asked him and he told me.

Q. I am asking whether you told anybody else yourself?

A. That he told me that he didn't mean to?

A. Yes, that he told you that he didn't mean to.

A. Why, no, I don't know if I did or not.

(Testimony of Mrs. Evelyn Mason.)

Q. As a matter of fact, didn't you say on that very day that you believed that he had killed himself?

A. No, I never told anyone, because I know all the time—

Mr. SCALLON.—Just a minute. I am asking you what you told.

Redirect Examination.

Mr. JUDSON.—Q. Mrs. Mason, Mr. Scallon has asked about staying up there at your house. Why haven't you stayed up there at your house?

A. The house, I couldn't keep it up, I couldn't pay the expenses; I had to rent it.

Q. Is there any reason why you couldn't?

A. Well, anyone would know I couldn't stay in that house alone now. [115]

**Testimony of J. P. Burns, for Plaintiff.**

J. P. BURNS, called and sworn as a witness for and on behalf of the plaintiff, in answer to the questions put to him testified as follows:

Direct Examination.

Mr. JUDSON.—My name is J. P. Burns. I am sheriff of Cascade County. I was such sheriff on the 6th day of May, 1919. The next day I went to the home of George Mason to make an examination of the premises. I examined the basement of the house. I found blood, looked as though he had laid down on a spring bed that was there. I found two bullets and two empty cartridges.

Q. Here is a purported diagram of the premises thereof, of the basement, supposed to be approxi-

(Testimony of J. P. Burns.)

mately; will you look at that and tell us whether or not you could tell us from that where you found those empty cartridges?

A. I found one of them right here near this window.

Mr. SCALLON.—Objected to because it is not shown that the premises were in the same condition that they were at the time of the accident, as to position of the cartridges and the shells

Mr. JUDSON.—May I withdraw this witness and ask Mrs. Mason?

The COURT.—I think we will proceed with this witness and show it later. If it is shown sufficiently, it may be stricken out.

Mr. SCALLON.—Save an exception.

I found one of the bullets right here at the bottom on the floor close to the wall. It looked as though the bullet had struck the wall. This is the window on the street on the west side of the building. There were two windows on the west, but this one in the rear appeared to be closed up mostly. The window was on this side and the bed was over on the other side. The distance from the window where I said I found this shell to the bed in the basement was probably 24 or 25 feet, something like that; may be 22 feet. The cartridge I found there was from a 22 Colt's automatic—or 32. The cartridge had been discharged. I found two cartridges there. I found two bullets there. One bullet was near the window and the other one was a little further over this way, further over towards center of the basement. I

(Testimony of J. P. Burns.)

have used an automatic. As to loading a gun and what becomes of the cartridges, well, after [116] they are fired, why they are thrown up; they may go ten or twelve feet away from you after they are discharged, when the injector throws them out, or they might drop right near.

Cross-examination.

Mr. SCALLON.—Q. I understand you to say that you found one of the shells across the room from the bed.

A. I found one of the bullets here, right here.

Q. Yes, and the other one where?

A. The other one was right about here.

Q. Near the furnace? A. Yes.

Q. And did you point out the place where the shells were?

A. I believe there was one shell lay in about here?

Q. That is about midway?

A. About here; yes, sir.

Q. About the middle?

A. Yes; and the other one about here.

Q. One also near the furnace? A. Yes.

Q. And one about halfway all across the room?

A. Yes, sir; close to the north side of the basement.

Redirect Examination.

Mr. JUDSON.—Q. I want to ask Mr. Burns about that; do you remember whether or not that furnace is near the middle of the room?

A. Well, it is a little bit to the east side of the room [117]

**Testimony of Henry D. Dunham, for Plaintiff  
(Recalled).**

HENRY D. DUNHAM, recalled as a witness on behalf of the plaintiff, in answer to the questions put to him testified in substance as follows:

Direct Examination.

Mr. JUDSON.—My name is Henry D. Dunham. I am an embalmer for W. H. George Company. I worked for them on the 6th day of May, 1919. I started to embalm the body of George Mason and Warnicker finished. He was clean shaven. As to any indication of a powder-mark on either of his hands, why, I never noticed it to be a powder-mark; there was a little mark right in here and kind of dark; I don't know what it was caused from or anything. It was the left hand; that is what I mean.

Cross-examination.

Mr. SCALLON.—I said there was a little mark right in here on the left hand. Right in there; it was just kind of dark in there is all, between the first finger and the thumb, back of the flesh joining the two, on the outside of the hand. Yes, on top of the hand.  
[118]

**Testimony of John C. Morrison, for Plaintiff  
(Recalled).**

JOHN C. MORRISON, recalled as a witness on behalf of the plaintiff, in answer to the questions put to him testified in substance as follows:

Direct Examination.

Mr. JUDSON.—I was on the stand before to-day.

(Testimony of John C. Morrison.)

I work for W. H. George & Company, undertakers. I saw the body of George Mason at the time of his death or shortly afterwards.

Q. Can you tell the jury whether or not—what was the condition of his face at that time as to whether or not he was shaved?

A. I believe he was clean shaven; I believe I remember remarking to Mr. Dunham—

Mr. SCALLON.—I object to what the witness said to anybody else.

Q. What is your remembrance?

A. I have remembrance, I believe, of him being clean shaven when the body came in.

(No cross-examination.) [119]

### **Testimony of Mrs. Lottie Burnhart, for Plaintiff.**

Mrs. LOTTIE BURNHART, called and sworn as a witness for and on behalf of the plaintiff, in answer to the questions put to her testified in substance as follows:

#### Direct Examination.

Mr. JUDSON.—My name is Lottie Burnhart. I reside at 114 Seventh Street, South. I am the wife of Sam Burnhart, a traveling salesman. I am acquainted with Mrs. Mason. I knew George Mason in his lifetime. I saw George Mason on the day of his death, after he was injured and before he died. I talked to him that day. Well, he said he didn't mean to do it. Mrs. Mason phoned to me to come up, and I went up there and Dr. Durning was in there and he was at the bedside, so I waited to get

(Testimony of Mrs. Lottie Burnhart.)

my chance to get to the bedside to talk to George, because it was an awful shock to me, a surprise, and when Durnin stepped out of the way I stepped up to the bedside and I took hold of George's hand and asked him what in the world had happened. He said, "Lottie, I didn't mean it." Mae commenced to cry and we both talked and he repeated the same words to her, that he didn't mean it, and then he commenced about the baby.

(No cross-examination.) [120]

### **Testimony of E. T. Redfern, for Plaintiff.**

E. T. REIFERN, called and sworn as a witness for and on behalf of the plaintiff, in answer to the questions put to him, testified in substance as follows:

#### Direct Examination.

Mr. JUDSON.—My name is E. T. Redfern. My occupation is a machinist. As such machinist I have had considerable to do with automatic guns. With bullet wounds having powder marks from a half to three-quarters of an inch out from the edge of the bullet hole, the front or end of the gun would have to be held pretty close to the body,—five or six inches. I have had a good deal to do with testing automatic guns in my experience as a mechanic, and repairing them. [121],

**Testimony of Mrs. Evelyn Mason, in Her Own Behalf  
(Recalled).**

Mrs. EVELYN MASON, recalled as a witness in her own behalf, in answer to the questions put to her testified as follows:

## Direct Examination.

Mr. JUDSON.—Q. Mrs. Mason, will you tell the jury whether or not that basement was in the same condition in which it was at the time Mr. Mason received the injury in that basement as when Mr. Burns went there?

A. Well, Mr. Burns was the first one that went up; I gave him the key.

Q. And it was locked up and no one could go in the house prior to that time?

A. Yes, it had been locked; no one had been there.

Q. And you went out with the people that were there? A. Yes.

Q. Was that basement left by you just the way it was at the time you found Mr. Mason there?

A. Yes, I didn't go back in the basement any more at all.

Q. Was Mr. Mason experienced with a gun?

A. Why, he told me he never had an automatic in his hands before.

Q. Was he experienced with any kind of gun, if you know?

A. He shot the small one a few times before, but I don't know, he never liked guns.

Q. Was that an automatic?

(Testimony of Mrs. Evelyn Mason.)

A. No, it was a little kind of gun.

Cross-examination.

Mr. SCALLON.—Q. Mr. Mason had been to Alaska how many times?

A. Been to Alaska how many times?

Q. How many times altogether had he been to Alaska? A. Why, I don't know.

Q. Had you met him in Alaska before you went with him?

A. Yes; I didn't go with him; I met him there [122]

Q. So you know of his having been there twice?

A. Yes.

Q. And how long had he been out in the western country, as far as you know?

A. He was up there the 14 months and then he has been here for years.

Q. At what place in Alaska was he?

A. Juneau and Valdez.

Q. In Juneau and Valdez? A. Yes.

Q. In what business was he engaged in there?

A. He was a waiter, waiting table, manager of the Alaska Grill in Juneau and waiter in Valdez.

Q. In one place manager of the grill. A. Yes.

Q. What year was that?

A. When we came from Alaska here three years ago—four years ago now.

Plaintiff rests. [123]

#### REBUTTAL.

The depositions of Albert Foster and Wm. A. Jones were read without objection. The depositions are (in narrative form) as follows:

**Deposition of Albert Foster.**

My name is Albert Foster, Jr. I am forty years old; I reside at 38 N. 7th Street, Newark, New Jersey. I am manager of Colt Arms Company, New York office. I have been manager of the New York office of the Colt Arms Company since 1910. I have been in their employ since 1910. Before that I was employed by the Winchester Repeating Arms Company as salesman. The Winchester Repeating Arms Company is a manufacturer of rifles, shotguns and small arms ammunition. I was in their employ from 1902 to 1910. I am familiar with the Colt Automatic pistol, calibre 32, bearing number 248,743. As to how they are numbered, the arms are numbered from one up, starting with each series, or that is, with each model. In other words, the automatic pistol, caliber 32, carrying the serial number 248,743, showed that there had been 248,742 of those pistols made before pistol 248,743 was made. The parts of each and all of the pistols belonging to a serial number are interchangeable, that is, the part of another pistol can be fitted to the pistol which you already have. I have a pistol of the series of the Colt automatic pistols belonging to the serial number 248,743, but it will not have the number 248,743. Only one pistol has that number, but there are at least 248,742 pistols like that one and I can get you one of those. I will produce such pistol, make it a part of and return it with my deposition. The serial number of the pistol I have produced is 321,799. The pistol I have produced and attached to my depositions is

(Deposition of Albert Foster.)

exactly alike serial number 248,743, except as to the number. The experience I have had in familiarizing myself with the various parts and qualities and operation of the pistol I got in capacity of salesman, demonstrating and selling the pistol for a period covering nearly ten years. In fact, I have handled the pistol a longer time than my employment with the Colt Company. Prior to going with the Colt, the Winchester Repeating Arms Company for which I worked, carried this same pistol for sale and I was a salesman [124] for it at that time. I have operated the Colt Automatic Pistol to a considerable extent. I have shot it and demonstrated it for a number of years in demonstrating before Police Departments, banks and others. I am familiar with all its parts. I can take it apart and put it together. I have done that often. The word "automatic" in the name of the pistol which I have produced refers to automatic loading of the barrel and automatic discharge of the exploded shell. The pistol both ejects the empty shell and throws a loaded shell into the barrel automatically, leaving the arm cocked and ready for firing. The pistol which I have produced, corresponding to Colt Automatic Pistol No. 248,743, is loaded by the means of a magazine, which magazine is loaded with eight cartridges. When these cartridges have been placed in the magazine, the magazine is then inserted in the butt of the pistol and the slide pulled rearward all the way back, upon its return forcing the cartridge from the magazine into the chamber or barrel of the arm, leaving

(Deposition of Albert Foster.)

the arm cocked and ready for firing. The magazine when it is loaded with cartridges is put into the butt-end of the gun in its place by simply sliding it in. In order to fire the pistol after it is loaded, it is necessary to exert the pressure both on the trigger and on the spring at the rear end of the pistol, both simultaneously. That is, ordinarily when one wants to shoot the pistol they will press the trigger with the fore-finger of the hand, press the spring at the rear of the pistol with the part of the hand between the thumb and the first finger, and pressure on both of these at the same time is necessary to fire the pistol once. After the pistol is fired once, it could not be discharged without releasing the pressure both on the safety and on the trigger. In order to fire the pistol twice, it would be necessary, first, to exert simultaneous pressure on the trigger and on the spring at the rear of the gun; then, secondly, to release this pressure and exert a similar pressure a second time. No, the gun would not continue firing if the pressure which fired one shot were continued. It would fire a second shot only by releasing the finger from the trigger and the spring in the rear of the gun known as the safety grip. This part of the gun which is referred to in the rear of it as a spring is called a grip safety. And to [125] fire a second time a similar pressure would have to be exerted on the trigger and on the grip safety that was exerted when the first shot was fired. There is a difference between the firing of the pistol in question and the firing of what is known as a machine-

(Deposition of Albert Foster.)

gun. The construction of the arms is entirely different. The machine-gun continues to fire as long as pressure is exerted on the trigger, but this pistol requires releasing of the pressure and the exerting of a new like pressure for every shot that is fired. As to how a person could fire the gun in question which I have produced, into one's own body, this can best be done by using the thumb for operating the spring at the rear of the gun, which is technically called the grip safety,—that is, if the shot was discharged close up to the body one could hold the pistol away from the body and explode it with the forefinger and the hand, just as in ordinary shooting with a pistol, and possibly one could fire the gun close up to one's body by exerting the pressure on the trigger and on the spring at the rear of the gun in the ordinary way, but this would be rather a difficult process. The corporate name of the company for which I am working is the Colt Patent Fire Arms Manufacturing Company. They sometimes make this Colt Automatic Pistol, such as No. 248,743, with a part of the works of the pistol uncovered so as to show the working of it. It is called a skeleton model. I will furnish counsel for the defendant a skeleton model of the Colt Automatic pistol No. 248,743 for use on the trial of this case. [126]

### **Deposition of Wm. A. Jones.**

My name is William A. Jones. My age is fifty-five. I live at 4400 Katonah Avenue, New York City. I am president of a private detective agency

(Deposition of William A. Jones.)

in 302 Broadway, known as William A. Jones, Incorporated. As to the experience I have had with pistols, I was connected with the police department of the State of New York for thirty-one years and eight months. From November, 1895, until July, 1911, I was in charge of the school for pistol practice with the police department. During the summer months the school used to close down. We moulded our own bullets. We used the 32-caliber Colt and Smith & Wesson revolvers. Along with my other duties I had supervision over the school for the instruction of pistol practice. We used what was known as the 380-caliber Colt Automatic Pistol in the school. That is a duplicate of the 32, but the caliber is a little larger. It is known as the 380-caliber. I was attached to the Homicide Bureau of the Detective Bureau along with my instruction in the shooting school, and my duties there were to investigate shooting homicide cases, and in that I covered all of Greater New York, and I have investigated shooting cases with almost every caliber of the pistol and almost every make of pistol that there is in the world. I own seven automatic pistols now myself, different makes. I have a 380 and a 25 and 45 caliber Colt automatic. I have a 35 Smith & Wesson, 32 Savage, 32 Harrington & Richardson. I have a 25 Mauser and a 25 Styer. In my experience in the investigation of homicide shooting cases I have attended between one hundred and fifty and two hundred autopsies, and in those autopsies I have taken notes for the doctors when they have been perform-

(Deposition of William A. Jones.)

ing the autopsy. That was my duty in the investigating of shooting cases. I was connected with the Homicide Police Department of the city from 1909 until I left the department on the 18th of last February. I have owned a Colt Automatic Pistol since it came out, and in any case that I had that an automatic pistol was used I have had the handling of the case all the way through, and I have been handling such pistols all the time since they first came out. I have made thousands of experiments with automatic pistols for powder stains on paper, cloth and different fabrics. I have [127] used it on skin from bodies. Have used it on animal skin by removing the hair with lye. If used on fresh skin it is almost like human skin and we get the same markings on it that we would on human skin. I have used that in a great many experiments to reproduce powder stains on bodies that I have been investigating. I can take a Colt Automatic Pistol down and put it up again. I am familiar with all its workings. The pistol which the witness Foster has produced in these depositions and attached to his deposition as an exhibit which you now show me is Colt Automatic Pistol No. 321,799 32 caliber. The pistol I now have in my hand and which is referred to in my last answer is a duplicate in every respect of Colt Automatic Pistol No. 248,743, except the number. I know that from my experience with these pistols. I know that all manufacturers in manufacturing pistols give each pistol a serial number. They start with No. 1, which is the first of a

(Deposition of William A. Jones.)

series of pistols, and then all that are made of that make of pistol are alike except as to the number. I will explain how the Colt Automatic pistol of the series which I have in my hand and to which No. 248,743 belongs, works. To load this pistol you have to draw the magazine back, insert the cartridges in the magazine, then place the magazine in the frame of the pistol. Then draw the slide back and as it goes ahead into place it loads the pistol. Then to discharge it you have to exert pressure on the grip safety at the rear of the handle and on the trigger at the same time. At the discharge the recoil drives the jacket back and as it goes ahead again it reloads it. If you to continue to exert the pressure the pistol will not go off, but if you release the pressure both on the trigger and on the spring at the rear, and then exert it again just as in the instance of first firing, the pistol will go off again. In order to fire the Colt Automatic Pistol a second time, it is necessary that the pressure both on the trigger and on the rear spring must be released. Then it must again be exerted for the second discharge and for all the discharges after that as long as the magazine has the cartridges in it. The difference between the method of discharging the Colt Automatic Pistol and the method of discharging a rapid-fire gun is [128] that in a rapid-fire gun as long as there is continual pressure on the trigger it will keep right on firing. You have to release the trigger to have the arm stop, but with the Colt Automatic Pistol it loads automatically. It cocks itself automatically, but it does

(Deposition of William A. Jones.)

not fire automatically. You have to release the pressure from the preceding charge and exert it again for each shot. [129]

SURREBUTTAL.

**Testimony of E. T. Redfern, for Plaintiff (Recalled in Surrebuttal).**

E. T. REDFERN, recalled as a witness on behalf of the plaintiff in surrebuttal, in answer to the questions put to him testified in substance as follows:

Direct Examination.

Mr. JUDSON.—I am familiar with the workings of that automatic gun. I can take that gun down and put it together. I have fired a gun similar to that, so I know their action when they are fired.

Q. I will ask you to turn that gun, take hold of it and turn it toward—point it toward yourself. What would be the action of that gun held in this manner?

A. In this manner?

Q. Yes. I will ask you to hold the gun in that manner; I will ask you what would be the action of that gun held in that manner, if the revolver would move after fired? A. The revolver would jump.

Q. How far would that revolver jump?

A. Held in that position it would possibly jump an inch as the gas pressure going out of the side of the gun would have a tendency to thrown the gun.

Q. How fast can that gun be operated, Mr. Redfern, if you know? A. About 8 shots a second.

Q. About 8 shots in a second?

(Testimony of E. T. Redfern.)

A. About as fast as it will function.

Q. You may state whether or not, if you know, you have to release your finger any noticeable amount in order to again fire that gun?

A. You do quite a bit, but you also have to release the lock in the back.

Q. In the rear?      A. In the rear.

(Whereupon the plaintiff rested.) [130]

The foregoing, together with the exhibits introduced in evidence and admitted in the case and referred to in the preceding testimony comprise the whole of the evidence introduced in the case. The exceptions noted in the foregoing statement of the evidence were duly taken at the time.

After the conclusion of the evidence, the case was argued to the jury by the respective counsel and then the Court instructed the jury as follows:

### **Instructions of Court to the Jury.**

**GENTLEMEN OF THE JURY:** To come now to the instructions, which will be very brief.

As in all other cases, the Court advises you what is the law applicable to the case, and you accept the law from the Court, but, as in all other cases, what the facts are, what is proven in the case, what inferences you will draw from the circumstances involved, are entirely for you, the jury.

The Court might comment on the facts, on the circumstances, but if it does so, and even expresses an opinion—which it is not likely to do in this case—it is never in an endeavor to bind you to the same view,

because the Court cannot, but solely in the hope to, aid you to reason to a correct conclusion. So, remember, the Court is responsible for the law, but you, the jury, are responsible for a determination of the facts.

This is what is termed a civil action, not a criminal action. It makes a difference in the matter of the proof. The plaintiff sues upon an insurance policy to recover the face of it, and the defendant, admitting liability to a limited extent, denies that it is liable for the full amount of the face of the policy by reason of the fact that, in accordance with the terms of the policy, it was not to be liable if the insured person committed self-destruction or suicide, and it assumes the burden of satisfying the jury that the deceased did commit self-destruction or suicide.

This insurance policy is a contract just like any other contract between two men or corporations, or men and corporations, to be construed like them and to be carried out and performed like them, and to be enforced by a jury,—no different from any other contract. This contract contains a provision [131] that in the event of self-destruction during the first two insurance years, whether the insured person be sane or insane, the insurance under this policy shall be a sum equal to the premiums thereon which shall have been paid to and received by the company, and no more. It seems this policy was issued to Mason in December of 1917; its face value was for five thousand dollars, and upon it he had paid two premiums aggregating \$445.00, and the only issue in this case, he being dead within the first two

years—and no dispute about these facts—the only issue and question in this case for you is, did he commit self-destruction? Did he commit suicide? In any event your verdict will be for the plaintiff, but if you find that he committed self-destruction or suicide your verdict will be for only the two premiums, \$445.00, but if you do not find that he committed self-destruction or suicide then your verdict must be for the plaintiff for the face value, \$5,000.00, and interest from a day in last May when proofs of death were made.

Now, in this case the burden of proof is on the defendant to satisfy you, by a preponderance of the evidence, that the deceased person did commit self-destruction or suicide. When I say that the defendant must prove that to you by the preponderance of the evidence, I mean the greater weight of the evidence. You will remember that in a criminal case, in order to prove the defendant guilty, you must be satisfied beyond a reasonable doubt. That is not the rule in civil actions; the party who must prove anything to the satisfaction of a jury needs only prove it by the greater weight of the evidence. You might assume that the evidence for and in behalf of the two parties is before you in two scales, and if the scale in which is the defendant's case does not outweigh the other sufficiently so that you say it has the greater weight and satisfying you that the deceased person committed self-destruction or suicide, then the defendant has not sustained the burden of proof and necessarily your verdict will be for the plaintiff. The preponderance does not mean simply the words

and the language of witnesses; evidence is not limited to the testimony of witnesses, but all the circumstances that surround the case and the incidents involved so far as they are made known to you are evidence in [132] the case and to be taken into consideration by you in determining whether the greater weight of the evidence is with the defendant. Inferences that you draw from circumstances are evidence; that is why circumstances are introduced into a case, so that from them you may arrive at proper judgment, draw proper inferences, such as commend themselves to your mind as reasonable men endeavoring to do justice upon the case before you.

You must remember above all things in this case that there is no room for sympathy, no room for prejudice. Both sympathy and prejudice are the enemies of justice, because they interfere with sound judgment. This is a case merely upon a contract which both parties have a right to have carried out as the defendant and the deceased Mason made it, in accordance with its terms as they made it, regardless of consequences. As I have so often told you, you do not render verdicts in accordance with consequences, but your oath is "a true verdict to render in accordance with the law and the evidence in the case."

In view of this policy, in view of the contract into which Mason entered with the defendant, it does not matter what was the mental condition of Mason; whether he was sane or insane *or insane* does not enter into the matter at all. The only question is whether or not he intentionally committed self-destruction or suicide.

Gentlemen of the jury, in cases of this sort a presumption arises; and a presumption is a fact or a condition which must be assumed to exist without evidence or proof. The presumption in this case at the beginning, and before any evidence is laid before you the presumption is, that the deceased Mason did not commit suicide. The love of life, the instinct of man to preserve his own existence and his own attributes, are supposed to protect him from an act which is condemned by the whole world as immoral and criminal,—the act of self-destruction or suicide. This is the status that the law clothes the deceased and his acts with at the beginning of the case, and you have it in mind as a starting point, from which you begin to weigh the evidence in behalf of the defendant's contention that he did commit suicide, in behalf of the plaintiff's contention that it was accident, in order for you to make up your minds, in view of the whole, whether or not you are satisfied that he did [133] commit suicide, in behalf of the plaintiff's contention that it was accident, in order for you to make up your minds, in view of the whole, whether or not you are satisfied that he did commit self-destruction. Whenever the evidence in the case satisfies you that, in spite of this presumption against suicide, that the deceased did commit suicide, of course the presumption that he did not disappears and you render your verdict in accordance with what you find the fact to be.

In determining whether or not Mason committed suicide, you take into consideration all the facts and circumstances that have been laid before you, not

merely those that have been produced in behalf of the defense, but also those that have been produced in behalf of the plaintiff in this action, and considering them altogether, not weighing one isolated circumstance and passing judgment on it and then casting it aside saying you do not believe it or do believe it, but *taking consideration* all the facts and all the circumstances and derive judgment that satisfies you, in view of the whole; and, as the Court said before, if your judgment is with the greater weight of the evidence and satisfies you the defendant committed suicide, then the lighter verdict, the smaller verdict, is the one you find for the plaintiff.

If the evidence in the case is as consistent, as reasonably consistent, with accident, which is the plaintiff's theory, as it is with suicide which is the defendant's theory, then you ought to choose the hypothesis of accident, because the presumption against suicide goes in aid of that theory. If, however, you cannot reconcile the evidence in the case, including all the circumstances and the inferences you will draw reasonably, as reasonably with accident as with suicide, then of course you reject the theory of accident and render a judgment that the deceased was guilty of suicide. I say you will; I say you do what your duty calls for, if that is your conclusion. The Court does not say that ought to be your conclusion. The only mandate that the law lays upon you is to render a verdict in accordance with your views of the evidence and of the law, not as you would like to do out of sympathy or out of prejudice or anything of that sort.

In determining this question—the only issue as I have said which [134] is in the case—you take into consideration the insured's condition, Mason's condition, so far as it has been shown to you about the time when he did die; his prior statements and actions in so far as they have been laid before you; his feelings; his disposition towards his family in so far as it appears; his financial circumstances and his actions in connection therewith so far as made known to you, in order to determine whether at the last moment he had an intent to voluntarily take his own life and whether or not he did so. The mere fact that you may not be able to discover satisfactorily to yourself any motive for suicide is not conclusive that he did not commit suicide. Very often men do commit suicide without making known their motives, but if you do not discover my motive it is a circumstance that has to be weighed on the side of the plaintiff's theory that he killed himself by accident rather than by intentional conduct—self-destruction and suicide.

You take into consideration, also, in so far as it appears to you, any statements made by the deceased Mason, in so far as you believe they were made. There were some testified to by the doctor who waited upon him—you will remember them; the Court will not go over them; the doctor asked him who did it. "I did it myself; I shot myself twice." But whether or not, if those statements were made, if you believe the doctor's evidence to that fact, whether or not you will accept that statement as indicating suicide is entirely for the jury. Language ought to be given its customary and ordinary meaning unless you see rea-

sons to give it some other meaning. Always view evidence before you reasonably;—what is reasonable? That is the great test of truth—what is reasonable. And there are statements by the doctor that when he was going to the hospital I understood the doctor to say that he and the wife and the deceased rode together to the hospital?

Mr. SCALLON.—Not the deceased, no; the deceased was in the ambulance.

The COURT.—I think that is right. The doctor and the wife went together, and the deceased Mason was taken in the ambulance perhaps or some other way, and he testifies to certain statements that he says she made to him on the way, namely, that she said when he came home from work that [135] day he was not feeling well and she said to him, “If you don’t feel like going to work”—I suppose that night, for he was a night worker—“Don’t go.” The doctor said that she told him that she knew no reason why he should have done that, and she also said—the doctor testified—that he said it was hard for a man feeling like he does to have to work; and then she spoke of the note that she found written, I mean on the envelope and propped up on the mattress of the bed. The theory of the plaintiff is that that note was written, as they claim, after the accident happened. The theory of the defense is that note was written before he committed the act which they term self-destruction and suicide. It is important evidence for you to consider. Ask yourself if it was written before whether it is not a clear intent, preparation for suicide; ask yourself if you believe it was

written after he shot himself whether it was further endeavors to make plain his business affairs or whether he would have limited himself to those particular words, if he accidentally shot himself and then wrote it. So far as appears here there is no word of explanation, no last word of affection for the wife or child or admonition of their care for the future. The Court simply refers to that all as circumstances, all of which you consider in determining the vital issue in this case.

The plaintiff, the widow of the deceased, says she did not make any such statements to Dr. Durnin, that she did not talk to him at all, or did not say anything to him on the way to the hospital, and she said something about the bill being a matter of difference between them and the size and amount of it, some of which she had paid. The question is for you whether or not you believe the doctor has departed from the truth out of prejudice against the widow, or whether you believe the widow has departed from the truth in an endeavor to save the amount of money involved in this action, or whether she may have forgotten. It is not necessary to condemn anyone as having committed perjury in this case. It can always be said that one remembers where another forgets, maybe trifling discrepancies between recollection; all may be honestly endeavoring to lay the situation fairly before you, and yet, although there are differences between them it may be entirely consistent with the truthfulness of both. There is a rule of law in the [136] evidence that you will reconcile conflicting statements of witnesses, if you

can, reasonably and consistent with your view of the entire case. There is another rule of evidence which is that all evidence is to be weighed in the light of what one is able to assert or produce and what the other side is able to deny or offset. There is evidence on the part of the plaintiff and another lady that the deceased person, in their presence alone, each of them so far as I recollect said that he said he did not mean it, that he shot himself but he did not mean it. Now, remember that the defendant cannot bring anything to deny those assertions; they can do nothing to offset it by direct evidence of witnesses, because there was no other witnesses there at the time that they are able to produce. It simply means this, this rule of evidence, this rule you have in mind in weighing evidence, it simply means this, that when a witness can swear to something before you that nobody else can deny you scrutinize the witness' testimony carefully to see whether he or she is taking advantage of her favorable position; for a witness who is reckless enough can go on the witness-stand and swear to anything, any isolated transaction between them and a dead person, which they say happened between them and the dead person only, without any fear of contradiction. There is no presumption of law that a witness will do that; the law simply says you have in mind that they can do it and with that in mind weigh their testimony to see whether or not you give them credibility.

Gentlemen of the Jury, the Court will repeat as it began that the only issue in this case is whether or not the defendant committed suicide. If you are not

satisfied that the defendant committed suicide, your verdict must be for the plaintiff for the full amount. If you are satisfied from a view of all the evidence that the defendant did commit suicide, still your verdict will be for the plaintiff, but for the small amount, \$445.00, because that is the contract that the dead man entered into.

When you retire to your jury-room you will select one of your number foreman and proceed to a verdict. It takes twelve of your number to agree upon any verdict in the case.

The Court does not think it necessary to give you the pleadings; [137] simply will give you the two forms of verdict and will let this gun go to the jury-room that you may see the character of the instrument and its operations.

On the 23d day of December, 1919, the jury retired to consider their verdict, and thereupon returned into court a verdict in favor of the plaintiff, and against the defendant for the sum of \$5,000.00 and interest.

And, later on the same day, on motion, the defendant was granted forty-two days in which to prepare and serve his bill of exceptions.

On the — day of December, 1919, judgment was entered on said verdict in favor of the plaintiff.

WHEREFORE, the defendant presents the foregoing bill of exceptions as and for its bill of exceptions to the rulings made and proceedings had on the trial of the above-entitled cause, and prays that the

same may be settled, allowed, signed and filed as such.

FLETCHER MADDOX,  
WALSH, NOLAN & SCALLON,  
Attorneys for Defendant.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the foregoing bill of exceptions is true and correct, and the same may be settled and allowed and signed as and for the defendant's bill of exceptions to the rulings made and proceedings had on the trial of the above-entitled cause.

Dated ——— day of February, 1920.

\_\_\_\_\_,  
Attorney for Plaintiff.

\_\_\_\_\_,  
\_\_\_\_\_

Attorneys for Defendant. [138]

Service of the foregoing proposed bill of exceptions is hereby acknowledged and receipt of copy thereof admitted this 2d day of February, 1920.

H. R. EICKEMEYER,  
GEORGE A. JUDSON,  
Attorneys for Plaintiff.

The foregoing bill of exceptions having been duly and regularly served and presented to the Court for settlement, and the matter of the final settlement of the said bill of exceptions coming on now regularly to be heard:

IT IS HEREBY ORDERED That the said bill of exceptions be, and the same is hereby allowed and settled and is now signed as and for the bill of ex-

ceptions of the said defendant, New York Life Insurance Company, to the rulings made and proceedings had on the trial of the above-entitled cause, and that the same be filed and made a part of the judgment-roll herein, and the same is hereby certified accordingly.

IT IS FURTHER ORDERED that the originals of these exhibits introduced by defendant, to wit, of the envelope, Exhibit No. 6, of the diagram, Exhibit No. 7, and the pistol produced with the deposition of the witness Albert Foster and the shirt of the deceased shall be authenticated by the signature of the Clerk of this court either on the exhibits or on a certificate of authentication attached thereto, and shall be deemed part of the foregoing bill and are hereby made part thereof.

Dated this 16th day of March, 1920.

BOURQUIN,  
Judge.

Filed Mar. 16, 1920. C. R. Garlow, Clerk. [139]

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Thereafter, on June 19, 1920, petition for a writ of error was duly filed herein in the words and figures following, to wit: [140]

In the District Court of the United States, District  
of Montana, Great Falls Division.

No. 783.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Defendant.

**Petition for Writ of Error.**

To the Honorable GEORGE M. BOURQUIN,  
Judge of the District Court aforesaid:

The New York Life Insurance Company, defendant above named, feeling aggrieved by the judgment rendered and entered in the above-entitled cause in the District Court of the United States for the District of Montana, on the 26th day of December, 1919, and complaining that in the record and proceedings had in said cause, and also in the rendition and entry of said judgment, manifest error has occurred to the great damage of the said defendant, as more fully appears from the assignment of errors which is filed with this petition, comes now and petitions the above-entitled Court for an order allowing said defendant to prosecute a writ of error out of the United States Circuit Court of Appeals in and for the Ninth Circuit, and that such writ of error may issue out of the said United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record,

proceedings and papers in this case, duly authenticated, may be sent to said Circuit Court of Appeals, under and according to the laws of the United States, in that behalf made and provided, and for [141] such other and further order as to the Court may seem meet.

C. B. NOLAN,  
WM. SCALLON,  
FLETCHER MADDOX,  
Attorneys for Defendant.

WALSH, NOLAN & SCALLON.

Filed June 19, 1920. C. R. Garlow, Clerk. [142]

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Thereafter on June 19, 1920, assignment of errors was duly filed herein in the words and figures following, to wit: [143]

In the District Court of the United States, District of Montana, Great Falls Division.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY, a  
Corporation,

Defendant.

**Assignment of Errors.**

Now comes the defendant and plaintiff in error, New York Life Insurance Company, and in connection with its petition for a writ of error from the United States Circuit Court of Appeals for the Ninth

Circuit directed to the above-entitled court, says that in the record, the proceedings and the final judgment made and entered in said cause on the 26th day of December, 1919, manifest errors have intervened to the prejudice of the defendant and plaintiff in error, of which it makes the following assignments, to wit:

I.

The Court erred in sustaining the objection made by the plaintiff to the question propounded by the defendant to the witness Curry in these words, "What about the third sentence," referring to the exhibit marked No. 1 for identification, regarding which the witness was then being interrogated, the third sentence being as follows:

"It is a terrible strain but will strive to meet it bravely for Fern's sake."

which objection was as follows:

"MR. JUDSON.—I object to that as already answered."

The preceding questions and answers as to the third sentence are as follows: [144]

"Q. Well, about the third sentence in the telegram. A. The third sentence? \* \* \*

A. The third sentence to which you point is an assumption from the second one.

Q. Is not that assumption, if assumption it be, then based on something that she had said?

A. I don't think so.

Q. Well, please read it again.

A. Well, I have read it twice. No, sir, I don't think so. I have told you two or three times that I wrote this at my office on my own initiative,

and that, as I say, naturally follows out of the other; if the first was true the second is a natural consequence.

Q. Yes, I know all of that.

A. And the third one, you might go ahead, the final one is also.

Q. But what I want to get at is whether you wrote, for instance, the third sentence or the last sentence there? The fourth one has not been answered,—mere assumption and without having talked about these matters with Mrs. Mason?

A. The fourth sentence, as you will recall, is a matter of inquiry, or substantially that, that Mrs. Mason—it wouldn't be necessary to ask Mrs. Mason for any information concerning that."

which ruling was duly excepted to.

## II.

The Court erred in sustaining the objection of the plaintiff to the offer in evidence of the defendant's exhibit marked "1" for identification, which exhibit is in words and figures as follows:

"53 N. L.

Send NIGHT LETTER PAID and Charge to John  
A. Curry Personally.

May 6, 1919.

Mrs. Fred T. Benson, [145]  
8 West Oak Street,  
Chicago, Illinois.

Otto died this afternoon of gunshot wounds self inflicted. The poor boy had been in fair health following return home until to-day when he suddenly

grew despondent and committed the rash act. It is a terrible strain but will strive to meet it bravely for Fern's sake. Wire me if you are coming.

MAE.

Charge this to John A. Curry."

Plaintiff's objection to said offer was as follows:

"By Mr. JUDSON.—Objected to as incompetent, irrelevant and immaterial and not connected with this."

which ruling was duly excepted to.

### III.

The Court erred in overruling the objection made by counsel for the defendant to the following question put to the witness Oscar Frederickson by plaintiff's counsel, to wit:

"Did he about the time Mr. Scallon was asking about him say anything about buying some more property in town?"

which objection was as follows:

"Mr. SCALLON.—Objected to as immaterial and irrelevant and also as self-serving."

and to which question the witness made answer as follows:

"He said he was going to sell his stocks he had and was going to buy city property with his money from now on."

which ruling was duly excepted to.

### IV.

The Court erred in overruling the objection made by the defendant to another question put by counsel for plaintiff to the witness Oscar Frederickson in these words, to wit:

“Did you hear anyone ask him to purchase a gun?”

which objection was as follows: [146]

“MR. SCALLON.—Objected to as immaterial and irrelevant and also as incompetent, if your Honor please.”

and to which the witness answered as follows:

“A. I did. He has told me. \* \* \*

A. Well, I heard Mrs. Mason say one time, ‘George, you will have to get me a gun if you want me to stay out at that house.’”

which ruling was duly excepted to.

V.

The Court erred in overruling defendant’s motion to strike out the statement made by the witness Oscar Frederickson in answer to the question propounded by counsel for plaintiff:

“Had there been anything happen at the house that would cause him that you know of—”

which motion was as follows:

“MR. SCALLON.—Move to strike that out as incompetent, irrelevant,—statement of the house.”

and which answer was as follows:

“Well, there was some people tried to break in the house during the time they was away to California.”

which ruling was duly excepted to.

VI.

The Court erred in overruling the objection made by the defendant to the following question put to the witness John C. David:

“You may state whether or not he appeared to be wholly ignorant as to the operation of the gun which you showed him?”

which question referred to the insured, and the said objection was as [147] follows:

“Mr. SCALLON.—Objected to as incompetent, if your Honor please.”

and the answer to which was as follows:

“I should say so, yes.”

which ruling was duly excepted to.

### VII.

The Court erred in overruling the objections to the questions propounded by plaintiff's counsel to the plaintiff while testifying as a witness in her own behalf, and allowing her to complete her answer to the question when it appeared that she was about to testify to a conversation between herself and her late husband, and to testify to conversations and transactions between herself and her said late husband, the insured, and the Court erred in allowing other questions to be propounded by counsel for plaintiff to the said Evelyn Mason regarding conversations and transactions between herself and her said husband, the insured. By ruling of the Court, the objections thus made were deemed to apply to each and every question to be thereafter put to the said witness in regard to the said matters, and applies to them, and the defendant specifies as errors the allowance of each and every of said questions, and the allowance of the answers thereto.

The defendant's said objection was as follows:

“Mr. SCALLON.—One moment, please. We object to oral communications between these parties, on the ground the witness is incompetent to testify to the same, first, because she was the wife of the deceased and, second, because she is a party to the suit and, regardless of marital relations, the communications would be between a party to a suit and a deceased person, and therefore, doubly incompetent. We refer to, and your Honor of course is familiar with, the provision of the law relating to married people, and in addition to that, if your Honor please, in the Act passed in February, 1913, there occurs a Fourth subdivision, together with [148] the introductory sentence, which reads as follows:

“ ‘The following persons cannot be witnesses: Parties or Assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against any person or corporation, as to the facts of direct transactions or oral communication between the proposed witness and the deceased or the deceased agent of such person or corporation, and between such proposed witness and any deceased officer of such corporation.’ The statute, as your Honor will see, introduces a disqualification that had not formerly obtained under the Montana statute, by introducing that subdivision four. It happens, if your Honor please, that the statute is not correctly printed in the official edition of 1913. In supplement published by Bancroft-Whitney it is substantially complete, but not

absolutely so; there is an absence of a comma and the absence of the article 'the.' I have here a certified copy of the law.

The COURT.—Has this law been construed by the courts?

Mr. SCALLON.—Not that I know of."

The ruling of the Court thereon was as follows:

"I am of the opinion that this new enactment of 1913 has no application to a case such as that now before the Court. There are two or three words in it that render it somewhat ambiguous and somewhat confusing, but I am of the opinion that it relates to a case wherein the defendant person is deceased, or the agent of the defendant is deceased, or the agent of a corporation or the officer of a corporation is deceased, where the witness about to testify purports to testify to evidence happening with that deceased person. This is not such a case to which the law is designed to apply. The defendant, no agent or officer, is involved; simply a statement of a witness and party's deceased husband to her. Now, as to the provision [149] of the law that no husband nor wife, without the consent of the other, can be examined as to any communication made by one to the other during marriage, of course that law is designed for a good purpose, supposed to be better for the peace and happiness of the family and for communities in general that husband and wife be not permitted to testify as to what happened between them, either against the other, or in any other proceeding,

unless both are willing. Where one is dead of course the consent of that person cannot be procured and ordinarily the testimony of the other to what took place between them during the marriage relation, received during the married relation, would be excluded, but in this case the defendant has already introduced some testimony as to what this witness said had taken place between her and her husband in her lifetime, and I am of the opinion that, so far as the defendant will be in position to invoke that rule of law, that they have waived it and can waive it; parties can waive it; they waived it by appealing to those very confidential communications which it is the policy to bar. For instance, they have had witness Silk testify as to what this witness testified to at the coroner's inquest in reference as to what her husband had said to her, and produced an envelope written by him to her which she had secured. Therefore, for these reasons, the objection, which I believe otherwise would be good, will be overruled."

which ruling was duly excepted to.

Then the following occurred:

"Mr. SCALLON.—To avoid entering any further objections of record, it may be understood this goes to the whole of this.

The COURT.—I think so, yes, so far as it touches communications between the witness and deceased husband, private communications."

The questions and answers allowed by the Court, in pursuance of the said ruling, were as follows: [150]

“Q. Now, the gun,—what did you mean by ‘he would get the gun?’

A. I had asked him to get the gun—”

(Here occurred the objection and rulings.)

“Q. You may answer that now, Mrs. Mason.

A. I had asked him to get the gun because someone had broken in the back door before and someone was around the house that night, and a few days before he promised to get it and he never got it, and that evening I was downtown, baby and I, and I went into the Gerald Cafe and I went in the back box and Mr. Frederickson waited on us and George came in and I asked him if he had seen about getting the gun, and he said, ‘No, but I will to-night as soon as Mr. Burns comes in.’ \* \* \*

Q. And why did he want to see Mr. Burns, the sheriff?

A. Why, he was going to get a permit to get the gun, but he thought he could get it without getting the permit.

Q. Now, then, he left the house, did he?

A. Why, he talked awhile and then I was dressing and he went before I did, on the car.

Q. Where did he go,—downtown?

A. He went downtown.

Q. And in what spirits was he when he left the house?

A. Why, he seemed happy; he come back and kissed me and he had been playing with the baby and rolling on the floor with an orange.

Q. What did you do after that when he left for downtown?

A. I finished dressing and then baby and I went downtown.

Q. And when did you return home?

A. I think it was near 4:00 o'clock.

Q. And this was on the 6th day of May, 1919?

A. Yes. [151]

Q. When you returned home what did you discover, if anything?

A. Well, I left the door so he could get in, and I seen he fed the dog, and I went in and I saw he brought a package in, and baby ran in the room and I called her and told her not to wake up daddy and she said, 'He isn't there,' and I heard him calling from the basement.

Q. What did he say?

A. He said, 'Mae, Mae!' \* \* \*

Q. What did you then do when you got down to the basement?

A. He said, 'I bought that gun and it shot me twice.'

Q. And did you see a gun there? \* \* \*

I started to pick the gun up and he grabbed hold of my hand and told me not to touch it, it would shoot me, it shot repeatedly, and he didn't want me to touch it. \* \* \*

A. I helped him upstairs, \* \* \*

Q. And while you were in the basement did he say anything else to you or—did he say anything to you about the shooting while you were in the basement?

A. I asked him how it happened and he said, 'I didn't mean to.'

Q. How did he get upstairs then?

A. I helped him upstairs.

Q. And where did you go with him when you went upstairs?

A. Into the bedroom and he lay on the bed.

\* \* \*

Q. There was some talk about an envelope that was there; [152] what was said about that envelope when you saw him?

A. When I went down the envelope was sitting on the bed, at the head of the bed. The post goes up; and he told me to take the money and stick it in my dress. I says, 'Why do you think of money now?' He says, 'If I have to stay in the hospital you will need that money.'

Q. Did he say when he wrote that note?

A. Why, he said he tried to get up and he couldn't, and he thought he was dying, so he didn't want to have the money in his pocket and afraid I wouldn't get it, so he took an envelope off the floor, and a trunk at the head of the bed, and he wrote it with a short pencil he had in his pocket to write orders with; the pencil was on the floor. \* \* \*

What evidence was there there that that had been done?

A. When I told him he said it was the coal cracking in the basement; then he went out and looked and there was a piece of steel about that long (indicating) under the window, and he

brought that in, and he was angry and said, 'I am going to get that gun and if someone tries to get in the house, to shoot them.' \* \* \*

Q. What, if anything, had you and Mr. Mason planned to do in the spring of 1919, just prior to his death or about that time?

A. Why, we were going to sell this home and take the money we had and a few liberty bonds and try to buy a larger place closer in, where we could have a couple of roomers and I wouldn't be afraid to stay alone.

Q. And for that purpose did he attempt to get any money any place?

A. That is the reason he sold this stock we had.  
\* \* \*

Q. Mrs. Mason, what do you say that he said about the gun [153] when you went downstairs? I am not sure whether the jury heard that or not.

A. He told me, 'I bought that gun and it shot me twice,' and he told me not to touch it that it shot repeatedly, that it might shoot me.

Q. What else, if anything, did he say about it?

A. He told me he didn't mean to shoot himself, —'why would an accident happen like this?'

Q. Did he say anything about whether or not he was shot seriously?

A. No, he told me he didn't think he was, when we were in the basement.

Q. You may state whether or not he said anything to you about—

A. He told me not to worry, everything would be all right.”

VIII.

The Court erred in sustaining the objection made on behalf of the plaintiff to the following question put by the defendant to the witness Evelyn Mason on cross-examination, to wit:

“Where was she living at that time?”

The word “she” in said question referred to Mrs. Burnhart, who was also a witness in the case and also referred to by the witness Evelyn Mason in her testimony. Said objection was as follows:

“Mr. JUDSON.—Objected to, incompetent, irrelevant and immaterial.”

which ruling was duly excepted to.

IX.

The verdict and judgment are contrary to law.

WHEREFORE, defendant and plaintiff in error prays that said judgment be reversed with directions that the cause be remanded [154] to the United States District Court in and for the District of Montana, with directions to reverse the said judgment and set aside the verdict.

WALSH, NOLAN & SCALLON,  
C. B. NOLAN,  
WM. SCALLON,  
FLETCHER MADDUX,

Attorneys for Defendant and Plaintiff in Error.

Due personal service of within assignment of errors made and admitted and receipt of copy ac-

knowledged this — day of June, 1920.

\_\_\_\_\_,  
\_\_\_\_\_,

Attorneys for Plaintiff and Defendant in Error.

Filed June 19, 1920. C. R. Garlow, Clerk. [155]

\_\_\_\_\_

Thereafter, to wit, on June 19, 1920, order allowing writ of error was duly entered herein in the words and figures following, to wit: [156]

In the District Court of the United States, District of Montana, Great Falls Division.

No. 783.

EVELYN E. MASON,

Plaintiffs,

vs.

NEW YORK LIFE INSURANCE COMPANY,  
a Corporation,

Defendant,

**Order Allowing Writ of Error.**

On motion of C. B. Nolan, Esq., Wm. Scallon, Esq., and Fletcher Maddox, Esq., attorneys for defendant herein,—

IT IS HEREBY ORDERED that a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore filed and entered herein, be, and the same is hereby allowed; that a certified transcript of the record, testimony, exhibits, stipulations, and all proceedings be forthwith transmitted to said United States Cir-

cuit Court of Appeals for the Ninth Circuit, and that a citation issue in due course.

IT IS FURTHER ORDERED that the bond on error be fixed at the sum of Seven Thousand Dollars (\$7,000.00).

Dated June 19th, 1920.

BOURQUIN,  
Judge.

Filed June 19, 1920. C. R. Garlow, Clerk. [157]

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Thereafter, on June 19, 1920, bond on writ of error was duly filed herein in the words and figures following, to wit: [158]

In the District Court of the United States, District of Montana, Great Falls Division.

No. 783.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,  
a Corporation,

Defendant,

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS, That we, New York Life Insurance Company, a corporation, as principal, and National Surety Company, as surety, are held and firmly bound unto Evelyn E.

Mason in the sum of Seven Thousand Dollars (\$7,000.00), lawful money of the United States, to be paid to her and to her executors, administrators and successors, to which payment well and truly to be made we bind ourselves, jointly and severally, and each of our successors and assigns, firmly by these presents.

SEALED with our seals and dated this 18th day of June, 1920.

WHEREAS, the above-named defendant and plaintiff in error, New York Life Insurance Company, is about to petition for a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled case;

NOW, THEREFORE, the condition of this obligation is such that if the above-named defendant and plaintiff in error shall prosecute its writ to effect, and answer all damages and costs, if it fails to make its plea good, then this obligation shall be void, otherwise to remain in full force and effect.

It is expressly agreed by the National Surety Company, the [159] surety above named, that the signing of the name of said New York Life Insurance Company by its attorneys is to be deemed sufficient to all intents and purposes, and that in case of a breach of any condition of this bond, the Court may upon notice of not less than ten days to said National Surety Company proceed summarily in this action to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment

against said National Surety Company and award execution therefor.

NEW YORK LIFE INSURANCE COM-  
PANY,

By WALSH, NOLAN & SCALLON,

Its Attorneys.

NATIONAL SURETY COMPANY,

By A. L. SMITH,

Resident Vice-President,

[Seal]

Attest: ROBERT S. KING,

Resident Asst. Secretary.

The foregoing bond on error is hereby approved  
this 19th day of June, 1920.

\_\_\_\_\_,  
Judge.

Filed June 19, 1920. C. R. Garlow, Clerk. [160]

Thereafter, on June 19, 1920, a citation was duly  
issued herein, which original citation is hereto  
annexed and is in the words and figures following,  
to wit: [161]

In the District Court of the United States, District  
of Montana, Great Falls Division.

No. 783.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,  
a Corporation,

Defendant,

**Citation.**

United States of America,—ss.

To Evelyn E. Mason, Plaintiff Herein, and to George  
A. Judson, Esq., and H. R. Eickemeyer, Esq.,  
Her Attorneys:

You are hereby notified that in a certain cause wherein Evelyn E. Mason is plaintiff and the New York Life Insurance Company is defendant, pending in the District Court of the United States for the District of Montana, a writ of error has been allowed and granted to said defendant to the Circuit Court of Appeals of the United States for the Ninth Circuit. You are hereby cited and admonished to be and appear in said Circuit Court of Appeals at the city of San Francisco, in the State of California, within said Ninth Circuit, thirty days after the date of this citation, to show cause, if any there be, pursuant to said writ of error, why the judgment made and entered in said cause in said District Court should not be corrected and speedy justice done the parties in that behalf.

Dated 19th day of June, A. D. 1920.

BOURQUIN,

Judge. [162]

Dues personal service of the foregoing citation made and admitted and receipt of a copy thereof acknowledged this 21st, day of June, A. D. 1920.

GEORGE A. JUDSON,

H. R. EICKEMEYER,

Attorneys for Plaintiff. [163]

[Endorsed]: No. 783. In the District Court of the United States, in and for the District of Montana, Great Falls Division, Evelyn E. Mason, Plaintiff, vs. New York Life Insurance Company, a Corporation, Defendant. Citation. Fled June 23, 1920. C. R. Garlow, Clerk. By H. H. Walker, Deputy Clerk. [164]

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Thereafter, on June 19, 1920, a writ of error was duly issued herein, which original writ is hereto annexed and in the words and figures following, to wit: [165]

In the District Court of the United States, District of Montana, Great Falls Division.

No. 783.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,  
a Corporation,

Defendant.

**Writ of Error.**

United States of America,—ss.

The President of the United States of America, to the Honorable GEORGE M. BOURQUIN, Judge of the United States District Court for the District of Montana, and to the District Court of the United States for the District of Montana, GREETING:

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which is in

said District Court, before you, between Evelyn E. Mason, plaintiff, and New York Life Insurance Company, a corporation, defendant, manifest error hath occurred and happened to the said defendant, New York Life Insurance Company, as by its petition for a writ of error and assignment of errors appears, we being willing that such error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you if judgment therein given that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date of this writ in said Circuit Court of Appeals, to be then and there [166] held, that, the records and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States Supreme Court, this 19th day of June, A. D. 1920, and of the Independence of the United States the one hundred and forty-fourth.

[Seal]

C. R. GARLOW,  
Clerk of the District Court of the United States, District of Montana.

Due personal service of the foregoing writ of error made and admitted and receipt of a copy thereof acknowledged this — day of June, A. D. 1920.

\_\_\_\_\_,  
\_\_\_\_\_,

Attorneys for Plaintiff.

ANSWER OF COURT TO WRIT OF ERROR.

The answer of the Honorable, the District Judge of the United States for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is within made, with all things touching the same, I hereby certify, under the seal of said District Court, to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal]

C. R. GARLOW,  
Clerk. [167]

[Endorsed]: No. 783. In the District Court of the United States, in and for the District of Montana, Great Falls Division. Evelyn E. Mason, Plaintiff, vs. New York Life Insurance Company, a Corporation, Defendant. Writ of Error. Filed June 23, 1920. C. R. Garlow, Clerk. By H. H. Walker, Deputy Clerk. [168]

Thereafter, on June 23, 1920, acknowledgment of service was filed herein, in the words and figures following, to wit: [169]

In the District Court of the United States, District of Montana, Great Falls Division.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,  
a Corporation,

Defendant.

**Acknowledgment of Service.**

The plaintiff, through her attorneys, hereby acknowledges service on the 21st day of June, 1920, by copies, of the following papers in the above-entitled cause, to wit:

Petition for writ of error, assignment of errors, order allowing writ of error, bond on error and writ of error.

GEORGE A. JUDSON,

H. R. EICKEMEYER,

Attorneys for Plaintiff.

Filed June 23, 1920. C. R. Garlow, Clerk. [170]

Thereafter, on June 23, 1920, a praecipe for transcript of record was duly filed herein, in the words and figures following, to wit: [171]

In the District Court of the United States, District of Montana, Great Falls Division.

No. 783.

EVELYN E. MASON,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,  
a Corporation,

Defendant.

**Praecipe for Transcript of Record.**

To George A. Judson, Esq., and H. R. Eickemeyer, Esq., Attorneys for Plaintiff, Evelyn E. Mason, and Charles R. Garlow, Clerk of said Court:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned, the attorneys for the defendant and plaintiff in error above named, hereby serve upon you and each of you this praecipe in conformity with the rules of court, to indicate to you the portions of the records and files in the above-entitled cause which said defendant and plaintiff in error desires to and will incorporate in its transcript of record on writ of error herein, to wit, the writ of error issued herein on the 19th day of June, 1920, to have judgment hereinbefore rendered and entered herein reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, and the clerk of said

District Court will incorporate and include in said transcript the following:

1. The judgment-roll or final record in said cause consisting of the complaint, petition for removal, answer, reply, verdict, judgment entered December 26, 1919.
2. Bill of exceptions signed and filed on the 16th day of March, 1920.
3. Petition for writ of error and order allowing same. [172]
4. Assignment of errors filed with petition for writ of error.
5. Writ of error, and bond on error.
6. Citation on writ of error and acknowledgments of service by plaintiff and defendant in error.
7. Copy of this praecipe.

FLETCHER MADDOX,  
WALSH, NOLAN & SCALLON,  
Attorneys for Defendant.

Filed June 23, 1920. C. R. Garlow, Clerk. [173]

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**Certificate of Clerk U. S. District Court to Transcript  
of Record.**

United States of America,  
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 173 pages, numbered consecutively from 1 to 173, inclusive, is a full, true

and correct transcript of the record and all proceedings had in said cause, and of the whole thereof, required to be incorporated in the record on appeal therein by the praecipe of the plaintiff in error, as appears from the original records and files of said court in my custody as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of \$78.35 and have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 15th day of July, 1920.

[Seal]

C. R. GARLOW,  
Clerk. [174]

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[Endorsed]: No. 3523. United States Circuit Court of Appeals for the Ninth Circuit. New York Life Insurance Company, a Corporation, Plaintiff in Error, vs. Evelyn E. Mason, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed July 19, 1920.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

